SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~522~~. 218.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED DECEMBER 27, 1900.

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a No. .

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, PLAINTIFF AND appellant,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, defendant and appellee.

TRANSCRIPT OF RECORD.

An appeal from the district court of the first judicial district of the Territory of Arizona, Hon. George R. Davis, presiding.

ROBERT E. MORRISON, *United States Attorney,*
THOMAS D. BENNETT, *Assistant U. S. Attorney,*
Attorneys for Appellant.
WILLIAM HERRING, *Attorney for Appellees.*

Filed this day of , 1899, at o'clock, m. , clerk.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE TERRITORY OF ARIZONA, HAVING AND EXERCISING THE SAME JURISDICTION IN ALL CASES ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES AS IS VESTED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation,
Defendant.

No. B, 41.

TRANSCRIPT OF RECORD.

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE TERRITORY OF ARIZONA, HAVING AND EXERCISING THE SAME JURISDICTION IN ALL CASES ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES AS IS VESTED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES:

1

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation,
Defendant.

2

BE IT REMEMBERED that in the above entitled Court and cause, the plaintiff filed its complaint on the sixth day of March, 1895, and that thereafter, on the 22nd day of March, 1895, the said defendant and one D. D. Ross, who was then a party defendant, filed their answers to said complaint and thereafter, on the fifth day of November, 1895, the same being one of the days of the regular September, 1895, term of said Court the said cause came on for trial before the Court and a jury duly impanelled and that said trial continues from day to day until the 16th day of November, 1895, when the same was submitted to the jury and said jury retired to consider of its verdict and

3

thereafter, returned into Court and reported that they could not agree upon a verdict and thereupon the said
4 jury was discharged and the further trial of the case continued.

BE IT FURTHER REMEMBERER that thereafter, on the 25th day of May, 1898, plaintiff was granted leave to file herein and did file its third amended complaint, which is as follows, to-wit, omitting title of Court and cause:

COMES NOW the plaintiff and having first obtained leave of Court, files this its third amended complaint and for its cause of action against said defendant, complains
5 and alleges:

I.

That defendant, the Copper Queen Consolidated Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and doing business in the County of Cochise, Territory of Arizona.

II.

That said defendant wrongfully cut and caused to be
6 cut and removed from the surveyed and unsurveyed public lands of the United States of America, a large quantity of timber, to-wit: Five Millions, nine hundred and five thousand, five hundred feet of timber.

III.

That said timber was by the defendant wrongfully cut and caused to be cut from the following surveyed and unsurveyed public lands of the United States of America, to-wit: That certain land lying in a canon in the Chiricahua Mountains in, east of and adjacent to townships seven-
7 teen and eighteen south, ranges twenty-nine and thirty east of Gila and Salt River Base and Meridian, about sixty miles southeast from the town of Willcox on the Southern Pacific Railway and on what is known as Rock Creek, all in the County of Cochise, Territory of Arizona.

IV.

That the value of the timber so wrongfully cut and caused to be cut and removed from the said public lands of the United States of America, was the sum of Thirty one dollars per thousand feet and of the aggregate value of One hundred and eighty-three thousand, seventy and fifty one hundredths dollars ($183,070.50) lawful money of the United States of America. 8

V.

That all of said timber aforesaid, wrongfully cut and caused to be cut and removed from the surveyed and unsurveyed public lands aforesaid, by defendant, belonged to and was the property of the United States of America and all said timber was cut, removed, taken by, delivered to and used and consumed by defendant, Copper Queen Consolidated Mining Company. 9

VI.

That at the time the timber aforesaid was wrongfully cut, caused to be cut, removed, taken by, delivered to and used and consumed by the defendant, from the lands aforesaid, the said lands were surveyed and unsurveyed public lands of the United States of America, and defendant well knew that said timber was the property of the United States, and was wrongfully cut, caused to be cut, removed, taken by, delivered to, used and consumed by defendant, Copper Queen Consolidated Mining Company. 10

WHEREFORE, plaintiff prays judgment against defendant for the sum of One Hundred and eighty-three thousand, seventy and fifty one-hundredths dollars ($183,070.50) lawful money of the United States of America and for its costs and disbursements in this action incurred. 11

ROBERT E. MORRISON,

United States Attorney for the Territory of Arizona.

AND THEREUPON, the defendant, Copper Queen Consolidated Mining Company, was allowed by the Court
12 until 10 o'clock on the 26th day of May, 1898, to file its amended answer to plaintiff's third amended complaint and on said 26th day of May, 1898, the said defendant Copper Queen Consolidated Mining Company filed its answer to the third amended complaint of plaintiff, suggestion of the death of the other defendant, Daniel D. Ross having been duly made and it having thereupon been ordered that the suit abate against the said deceased defendant, Daniel D. Ross and that this action proceed against the surviving defendant, Copper Queen Consolidated Mining Company,
13 which said answer is as follows, omitting title of Court and cause, to-wit:

Defendant in answer to the Third Amended Complaint of Plaintiff, admits, denies and alleges as follows:

I.

Paragraph I of said complaint is admitted.

II.

Defendant denies that it cut or removed, or caused to be cut or removed, the said timber mentioned in said
14 complaint, or any part thereof; defendant further denies that said timber or any part thereof was cut upon the surveyed public lands of plaintiff, and denies that said timber or any part thereof was wrongfully cut or caused to be cut or removed; but defendant alleges that one Daniel D. Ross, formerly a defendant in this action but now deceased, cut and removed and caused to be cut and removed from unsurveyed public lands of the United States lying in a canon in the Chiricahua Mountains and in, east of and adjacent to townships 17 and 18 south, ranges 29 and 30
15 east, Gila and Salt River Meridian, about sixty miles south east from said town of Willcox and on what is known as Rock Creek, in the County of Cochise, Territory of Arizona, the quantity of timber mentioned in the second paragraph of the said complaint.

III.

Defendant alleges that said timber was sold and delivered to it by said Ross at the town of Bisbee in said territory, where defendant then was, and now is, engaged in the mining business, and that all the said timber was purchased by this defendant from said Ross and was used and consumed by it wholly for mining and other domestic purposes within the territory of Arizona and that no part thereof was exported therefrom, and defendant admits that the aggregate value of said timber at said town of Bisbee was the sum of One hundred and eighty-three thousand and seventy dollars and fifty cents; 16

IV. 17

Defendant admits that all of said timber cut by said Ross as aforesaid was delivered to and used and consumed by it, but otherwise paragraph V of said complaint is denied.

V.

Paragraph VI of said complaint is denied.

VI.

Defendant alleges that said timber was, by said Ross, cut and removed from public mineral lands of the plaintiff, 18 and was so cut and removed from said lands under the authority of the Act of Congress of June 3d, 1878; that said Ross had good right and lawful authority to cut and remove the same; that the same was cut and removed from said lands in good faith and that said Daniel D. Ross, at the time that he so cut and removed said timber was a citizen of the United States of America; that at the time of the cutting and removal of said timber, and of all of he acts herein admitted or alleged, the above named defendant and said Ross were bona fide residents of the Territory of Arizona. 19

VII.

That the portion of said Chiricahua Mountains from which said timber was cut and removed, is high and rug-

ged, with a broken and rocky surface, and not subject to entry under the existing laws of the United States except
20 for mineral entry; that said lands from which said timber was cut are within organized mining districts and that said lands are in the vicinity of, and adjacent to, valuable known and recognized mines, and were and are mineral lands, within the meaning of said Act of Congress, and that said Ross cut and removed said timber to be used for mining and other domestic purposes and not otherwise.

WHEREFORE, defendant prays that it may be dismissed hence with its costs.

21 Dated May 26th, 1898.

WILLIAM HERRING,
Attorney for Defendant,
Tucson, Arizona.

AND BE IT FURTHER REMEMBERED that upon said 25th day of May, 1898, the same being one of the days of the regular March, 1898, term of said Court, the plaintiff, by its counsel, Robt. E. Morrison, United States Attorney, Thos. D. Bennett, Asst. United States Attorney, and E. E. Ellinwood, Esq., Special Counsel for the plain-
22 tiff, and the defendant, by its counsel, William Herring, Esq., and Sarah I. Herring, announced that the case was ready for trial upon its merits and thereupon the Court and the said parties hereto, by their respective counsel, proceeded to impanel a jury for the trial of the case and said impanelling continued until the following day, the 26th day of May, 1896, when the following jurors were impanelled and sworn to try the case, to-wit:

John S. Merrill,
F. M. Likes,
23 A. Bachelier,
J. Knox Corbett,
Edward Hale,
George Farrington,
John Keating,

F. N. Walcott,
R. McCormick,
Frank Kernen,
P. A. Loffgreen,
F. W. Sweetland.

AND THEREUPON the third amended complaint and the answer thereto were read to the jury and the trial of the case was proceeded with and the following evidence was offered by the plaintiff and defendant herein, to-wit:

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE TERRITORY OF ARIZONA, HAVING AND EXERCISING THE SAME JURISDICTION IN ALL CASES ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES AS IS VESTED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES:

25

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation,
Defendant.

26

BILL OF EXCEPTIONS AND STATEMENT OF FACTS.

BE IT REMEMBERED that at a term of the District Court aforesaid, held at Tucson, the County seat of said County of Pima, beginnin gon the 14th day of March, 1898, and thereafterwards continued from time to time to and until the 27th day of May, 1898, on which said last mentioned day, said cause came on to be heard by the Court and a jury, upon the issues joined upon the pleadings. 27

WHEREUPON the plaintiff, the better to maintain the issues on its part joined, introduced the following tes-
28 timony:

Eugene J. Trippel, being first duly sworn, testified as follows:

My name is E. J. Trippel, I am at present the Register of the U. S. Land Office at Tucson, Arizona, and as such officer, I am the custodian of the official plats of the Public lands of the United States; I have some of those plats with me; I have now turned to plat of Township 17 south, range 29 east of the Gila and Salt River Meridian; the
29 lands contained in this township are partly surveyed and partly unsurveyed; all that township is surveyed except section 13, south half of 14 and all of 23. Unsurveyed, all of 24, 25, 34, 35 and 36 and the south half of the northeast half of 27, that is unsurveyed; the lands contained in this township and range are public lands of the United States; we have not the plat of township 18 south, range 30 east; it is not surveyed; half of township 18 south, range 29 east is unsurveyed and half surveyed. The west half is surveyed and the east half is not surveyed. The lands in the latter township and range are public lands of the
30 United States; townships 18 south and range 30 east and 17 south, range 30 east are not surveyed; we have not the plats of them; the lands contained in tps. 17 and 18 south, range 30 east are public lands of the United States; I only know where Rock Creek Canon is from where it is shown on the plats; It does not show here and I have not the field notes

CROSS-EXAMINATION.

31 In the unsurveyed portion of Tp. 17 south range 29 east are what is called the Chiricahua mountains.

Q. Do you know why those parts of that township remain unsurveyed?

By Mr. Morrison: Object to it as immaterial and irrelevant.

Mr. Herring: The reason those parts of that township 32
remain unsurveyed.

Mr. Ellinwood: And we offere the further objection that it is not proper cross-examination.

The Court: The objection will be sustained on the ground that it is not proper cross-examination.

Mr. Herring: Your Honor will note an exception.

Witness: The Chiricahua mountains are denoted upon that plat in the east half, on the unsurveyed portion 33
and marked along it is Chiricahua mountains.

Q. And the same question as to this part of the unsurveyed. . . . Do you know whether a part of this township is unsurveyed?

Mr. Morrison: We offer the same objection; that it is not proper cross-examination.

The Court: The objection is sustained.

Mr. Herring: Note an exception on the part of the defendant. 34

Thomas Golden Gerdine being produced and sworn on the part of the plaintiff, testified as follows:

My residence is part of the time Washington City and part of the time in the West; I am a surveyor you might say a civil engineer by profesion; I have been engaged in that business about seven years; am in the employment of the Geological Surveys Department of the United States Government; have been thus employed about four years; Rock Creek Canon is located on the western slope of the 35
Chiricahua Mountains and would lie in the northern part of township 18 south, range 30 east of the Gila and Salt River Base and Meridian; my impression is that the northern tributary to this canon heads in township 17 south

range 30 east; Rock Creek Canon would occupy the northeastern part of the township and a portion of it in town-
36 ship 17 south, range 30 east, if surveyed a small portion of it would be in township 17 south and that would be about the center of 17-30, on the western slope of the Chiricahua Mountains.

By Mr. Herring: No questions.

The Court: Call the next.

E. E. Ellinwood being produced and sworn on the part of the plaintiff testified as follows:

37 My name is Everett Epelgrove Ellinwood; I have lived at Flagstaff since the 17th of August, 1890. I have been the attorney of the Arizona Timber Co. at Flagstaff since 1890 and am as familiar with the transactions of that company as anyone may well be, and I know the value they have put for timber for the Atlantic and Pacific railroad grounds which extends for forty miles north and south, the railroad taking the odd numbered sections. The timber I have spoken of are pine very dense in some places and there are parts where it is open placed; the timber which
38 was sold to the company I have spoken of was from 8 inches to even 4 feet; as to distance from railroad and to market, the contracts included at that time the Azatland Cattle Company and the Arizona Cattle Company and the Atlantic and Pacific railroad company and it included timber thirty five miles away from the railroad, from the Atlantic & Pacific now the Santa Fe-Pacific Railroad; I say the contract of purchase included timber that far away; timber that far away was not cut; the railroad extended 35 miles south.

39 Q. I will ask you this question: Do you know whether or not the timber about which you were speaking was more or less valuable than the timber in the southern part of the Territory or the timber herein mentioned and out on Rock Creek Canon, timber in the trees or standing?

Mr. Herring: Objected to because the witness is not shown to know anything about the timber.

40 The Court: The answer may possibly develop whether the witness knows anything concerning the timber on this tract of land. The objection will be overruled.

Mr. Herring: We except.

Witness: I know nothing of the timber on this tract of land except from hearsay; from conversation with those who have been over the land; I am very familiar with that.

Q. Well, now what do you say as to whether that timber is more or less valuable, the timber in the tree, than the timber in the northern part of the Territory of which 41 you have spoken?

Mr. Herring: Objected to as incompetent.

The Court: The objection is sustained. I think you should show the character of the timber upon this tract of land and the situation as to the market.

Witness: I don't think any officer of the Copper Queen Company ever told me as to the character of the timber that was cut. I don't know whether any agent of the Copper Queen Company told me; they may and may 42 not have been agents of the Copper Queen Company; I heard a statement of it. I do not remember of having had a conversation or of having heard Mr. Ben Williams state the character of the timber. I have never been in Rock Creek Canon.

NO CROSS-EXAMINATION.

Ben Williams being produced and sworn on behalf of the plaintiff, testified as follows:

My name is Ben Williams; I am the superintendent 43 and agent of the Copper Queen Consolidated Mining Company of Bisbee, in Cochise County, and have been such since 1885. I am very slightly familiar with the timber or the trees which were growing in Rock Creek Canon in

Cochise County on the west side of the Chiricahua Mountains; the size of the trees was probably from a few inches
44 up to two feet at the time of the cutting. They were pine trees; about forty to forty-five miles from the Southern Pacific railroad in a southerly direction.

Q. Now, between those years of '90 and '93 did you know the market value of lumber delivered at Bisbee, cut from trees in Rock Creek Canon?

Mr. Herring: I object to that. The objection is upon the ground that the answer admits the timber was cut. That the quantity of timber delivered, as charged
45 in the complaint and its value, all stand admitted and we say this question is improper. It would shed no light on any issue for the issue stands confessed.

Mr. Morrison: The value per thousand has not been admitted and that is the object in asking that question.

Mr. Bennett: Do you admit that the value of the timber delivered at Bisbee was $31.00 per thousand.

Mr. Herring: We have admitted it.

The Court: Is there any issue made upon this point
46 which would require proof?

Mr. Bennett: Do you admit its value per thousand?

Mr. Herring: I admit its value at $31.00 per thousand. A simple sum in multiplication shows that; and I object to going into what is conceded in this complaint. It is admitted at $31.000 per thousand at Bisbee.

Witness: About the year 1890, as Superintendent and agent of the Copper Queen Company. I knew a man by the name of Daniel D. Ross. I first became acquainted
47 with him about '83 or '84.

Q. Well, about the year 1890 then, did you have any business transactions with Daniel D. Ross with reference to the purchase of timber?

Mr. Herring: That is objected to. The business transactions with which we are charged are set out in extenso in the complaint. They are not set out in the complaint, 48
but they are in the pleadings, I should have said. The Copper Queen is charged with purchasing this timber, charged with cutting the timber. We deny the cutting, deny the removing, deny causing to be cut and the causing to be removed. We admit, however, that we did purchase of Daniel D. Ross the amount of timber stated in the complaint. Now therefore, having admitted that, what issue is there in relation to the business transactions on the part of this defendant with Daniel D. Ross so far as any issue is now presented by the pleadings? We say there is none; there- 49
fore the question is irrelevant, incompetent and immaterial.

The Court: What is the purpose of this question?

Mr. Morrison: It is to discover the fact as to what the relationship was which existed between Daniel D. Ross and the Copper Queen Company.

The Court: The objection may be overruled and the question answered.

Mr. Herring: We except.

The Witness: I did as representative of the company. 50

Q. Can you tell about what date it was that you had those arrangements about the purchase of the timber?

Mr. Herring: I object to that as not going into the issues of the case.

Mr. Bennett: Why, even if it is admitted we have a right to fix the time.

The Court: Objection overruled.

Mr. Herring: Exception.

Witness: I think twice or three times I had pur- 51
chased timber for the Company of Mr. Ross.

Q. Will you state about the date that you as the representative and agent of the Copper Queen Company,

made arrangements with a man named Daniel D. Ross for the purchase of the timber which is described in the com-
52 plaint and admitted in the answer int his case?

Mr. Herring: It does not appear yer they made any arrangements with him for the purchase of timber. The question is objectionable in its form.

The Court: The objection is overruled.

Mr. Herring: Exception.

Witness: The first purchase of timber or lumber from Ross was in the fall of 1885; I can't tell the exact date.

53 Mr. Herring: I object to the question as immaterial and irrelevant.

The Court: The objection to the question will be overruled.

Mr. Herring: We except.

Witness: That is my answer; I can't tell whether it was timber from Rock Creek Canon or not but I answer that was the first purchase I made for the Copper Queen from Ross. I can only say that we purchased and received that quantity of timber from Ross; the first purchase was
54 in 1885 and for several years thereafter, we purchased the timber. The commencement of the delivery was in 1885 and the last delivery occurred in 1893.

Q. Were the arrangements for the purchase of the timber made before the timber was cut?

Mr. Herring: We object as immaterial.

The Court: The objection is overruled.

Mr. Herring: We except.

Witness: The arrangements was a contract to pur-
55 chase timber and Ross agreed to sell it. The contract was made before the timber was cut, at Bisbee. I knew, at the time that that contract was made and during the delivery of the timber that the timber was coming from the Chiricahua Mountains, from Rock Creek and vicinity.

NO CROSS-EXAMINATION.

E. E. Ellinwood, being recalled on behalf of the plaintiff, 56
testified as follows:

After having heard the testimony of Mr. Ben Williams as to the nature and character of the trees which were cut and that are mentioned in this case, the situating of the timber as to railroad transportation and as to the size of the trees running from a few inches to several feet, and this taken in connection with my knowledge of the value of timber in the northern part of the Territory, enables me to say that I believe the timber described in the complaint was of a greater value than $.150 per thousand; it was a 57
dollar and a half in the northern part of the Territory, and it is my opinion from my knowledge of the conditions in the Territory and of the scarcity of timber, that timber in Southern Arizona is worth more than in the northern part of Arizona; and our contract was for a dollar and a half per thousand with the whole timber in the belt.

CROSS-EXAMINATION.

I am not entirely familiar with any portion of Southern 58
Arizona, as to trees; I have talked with every witness in the case and am familiar with the conditions in the Graham Mountains; I have never seen the Chiricahua Mountains, except from a distance; I am familiar with the Graham Mountains from my observation and conversation I have had with other people who have cut timber; I have no personal knowledge from a physical personal inspection of each tree; I have been at the end of the Graham Mountains and have driven through there; I have never driven over them; that would be difficult to do, on account of the 59
mountains and also the trees; there are two or three saw mills there in the Graham Mountains; it is not a fact that I have no personal knowledge with the timber growing upon the mountains in Southern Arizona; I have an ac-

quaintanceship and I have seen the trees upon the mountains myself but as to a personal knowledge of each tree,
60 I have not that knowledge; I have no personal knowledge or acquaintanceship with the trees; I never counted them; the larger part of the timber plat adjacent to the Atlantic and Pacific Railroad is a plateau and it gets mountainous as soon as you get to Lover's Peak; it is a plateau about one hundred miles east and west and probably 75 miles north and south I never was up there when they were cutting or removing timber in Southern Arizona; I say that the timber in Southern Arizona would be more valuable because it is scarcer; if the difficulties were greater in
61 getting that timber, the value would be about the same: I think all the timber is more scarce in this southern part of the Territory; I don't think it is more difficult to get in; it is very difficult to get in; it would be more valuable if more difficult to get in to it; that is my opinion

RE-DIRECT EXAMINATION.

While it might be more valuable it were more difficult to get to, that condition might be more than set off by the difference in quantity, in favor of the northern part of the
62 Territory; but the timber varies and there is a difference between the difficulties of getting the pine and the spruce; the spruce which is used for telegraph poles, etc., is in the high regions and the same difficulties exist in Southern Arizona as in Northern Arizona so far as that is concerned; it is according to the different degrees of temperature.

RE-CROSS-EXAMINATION.

We cut timber in Northern Arizona for telegraph poles for railroad purposes; I do not know that the timber could
63 not be cut except by special grant; the railroad own the land for forty miles north and south, every odd section; it cannot be cut here unless you are building a railroad, except by a special grant; you can always cut timber from the adjacent lands to build a railroad.

RE-DIRECT-EXAMINATION.

There are many difficulties which enter into and affect 64
the price of timber; among others the difficulty of competition.

Government rests; on direct.

Mr. Herring, on the part of defendants, offered in evidence defendant's Exhibit A, a certified copy of the certificate of incorporation of the Copper Queen Consolidated Mining Company, filed in the office of the Secretary of the Territory of Arizona on the 21st day of November, A. D. 1890 which is admitted in evidence without objection. 65

Mr. Herring offers in evidence defendant's Exhibit B, a certified copy of the articles of incorporation of the Copper Queen Consolidated Mining Company, filed in the office of the County Recorder of Cochise County, on the 20th day of November, 1890. Admitted without objection.

Mr. Herring offers defendant's Exhibit C, a certified copy of the original appointment of Benjamin Williams as agent of the Copper Queen Consolidated Mining Co. as 66
it appears of record in the office of the Secretary of the Territory of Arizona, and was there filed on the 21st day of November, 1890; admitted without objection.

Mr. Herring: Defendant offers in evidence certified copy of field notes of the United States Surveyor General's office at Tucson; field notes of the Third Standard Parallel South, Range 29 East, Gila and Salt River Meridian.

Mr. Morrison: We object to this certified copy of the field notes of the Third Standard Parallel South, Range 67
29 East for the reason that that covers a great extent of country and it is not anywhere near the land on which the timber was cut. We say it is entirely irrelevant and immaterial.

ARGUMENTS.

68 The Court: I cannot see at this stage of the trial, how a certified copy of the field notes of the Surveyor General's office showing the position of the Third Standard Parallel South in Ranges 29, 30 and 31 East, Gila and Salt River Meridian, would be competent evidence in any issue in this case; you may renew your offer at any time later when it will be competent and relevant.

George J. Rosekruge: I live in Tucson, Arizona, where I have lived since 1874; I am a surveyor by profession and have recently occupied
69 the position of Surveyor General: before that, I was Chief Clerk and before that I served six years as a draughtsman in the Surveyor General's office. I have had large experience in practical surveying; I have been and am now a Deputy Mineral Surveyor and Deputy Land Surveyor; I made this map at your request, for the Copper Queen Company when I was a mineral surveyor; the data from which this map is made was derived from actual surveys made by myself on the ground, from certified copies of the township plats in the Surveyor General's office which were
70 handed me by myself and from the original field notes on file in the office. That map is correct.

Mr. Morrison: I object. The ground of the objection is that the witness has not shown himself to be qualified. At this point we ask the privilege of examining this witness as to his qualifications as a surveyor and an expert in the preparation of maps, before he testifies as to the correctness of the map.

Mr. Herring: There is no objection.

71 By Mr. Morrison: When were you Surveyor General?

Witness: I was Surveyor General a year previous to the 5th of last August, and from the first of April to the fifth of August, 1896, I was Surveyor General about a year and

six months. Before that I was six years chief draughtsman of the Surveyor General's office; outside of my official duties, I compiled a map for Pima County for the Board 72
of Supervisors. I never prepared maps in connection with my testifying as an expert; I don't know about my testifying as an expert; in three land grant cases, I have made maps and testified to them before the Land Court; the grants were the Sonoity, the Barbacomari and the San Rafael de Valle; those are the only cases that I have testified in before the Land Court in connection with any map I made of those grants; I didn't testify as a Mineral Surveyor at all; they were merely outlines; they were not topographical maps at all; they were used in establishing 73
the boundaries of the grants; three cases; I ran the boundary lines myself; I don't remember if I was a witness in several land grant cases other than these where I testified from my techincal knowledge as a surveyor; I have only testified in those three that I recollect; I have lived in this county since 1874; I have been engaged in surveying all of that time, except the time I was in the office; that is the occupation I have followed all that time; I was County Surveyor for 8 years; of this county; I have made maps and surveys of different parts of Pima County; I learned 74
surveying in the field and the office; I went out in the field in Mohave county, in this Territory as chainman and axman, in 1872; before that time, I had no technical or theoretical knowledge of surveying; I never studied it as a profession; all of my knowledge as a surveyor has been derived from twenty-five or twenty-six years practical experience in the field and in the office; I never studied the profession of surveying at any college or university; the three land grants I surveyed were the Senoity, the Barbacomari and the San Rafael del Valle; yes sir; I surveyed the out- 75
side boundaries of the San Rafael and prepared a map but it was not used in the trial of that grant for the trial has not come off yet; I surveyed the Tumacocari but my map was not used; I didn't testify in court; I surveyed the No-

gales de Selias for the Government under instructions from the Surveyor General; that was the first survey made; that
76 was not used in court; the maps which were used which I made were only those of the Sonoity, Barbacomari and San Rafael del Valle.

Q. Were those grants confirmed.

Mr. Herring: Objected to as immaterial.

Q. Were your surveys of the boundaries of those three grants sustained, do you know as a matter of fact?

By Mr. Herring: Objected to as immaterial, irrelevant and incompetent.
77

By the Court: Proceed.

The Court: Sustained by whom?

Mr. Morrison: Sustained by the Land Court.

Mr. Herring: Objected to because the question is not intelligible.

The objection will be sustained (By the Court).

Mr. Morrison: I will ask this question—whether any map that you prepared of the boundaries of any of these
78 land grants that you have surveyed have ever been accepted and sustained by the Court of Land Claims in which you testified?

Mr. Herring: That is objected to as unintelligible to this witness and objected to upon the grounds that it is incompetent, immaterial and irrelevant.

The Court: The objection will be sustained.

Mr. Bennett: We except to the ruling of the Court.

The Witness: I prepared these three maps of which
79 I have testified for the claimants.

Mr. Herring: This map is now offered in evidence and it may be marked defendant's Exhibit E; please point out on this map—

Mr. Morrison: We object to this map being exhibited to the jury before it has been admitted in evidence.

The Court: State your objection. 80

Mr. Morrison: The grounds of the objection are: (1) Before it is placed before this jury at this time * * * * * * * For the purpose of making the objection: That map as is stands here, on its face, shows that it extends over miles and miles and township upon township of country that is beyond the land upon which it is claimed this trespass was committed and over which the timber was cut, as described in the complaint in this case. That is the objection we make to this map; and an inspection of the map by the Court will disclose the fact 81
that upon land, townships away from Rock Creek Canon, there are mining claims so marked as mining claims, upon this map; we therefore suggest that the map is incompetent, because it is an endeavor to show the character of the land cut over by establishing the character of the land away beyond the boundaries of the land that was cut over.

Jury excluded.

ARGUMENTS. 82

Recess until May 28, 1898, at 10 A. M.

Tucson, Arizona, May 28th, 1898.

The Court: This is a map or rather a topographical chart, assuming to exhibit not only the lands from which the timber was cut but a large area beyond. There are upon it designations, tending to show the mineral character of designated parts; nothing to show the character of intervening portions; some of these designations have 83
been placed upon the chart by the witness Roscruge upon his actual knowledge of the facts they import; other upon hearsay. With these designations upon it it is my judgment that the chart may prove misleading and suggestive

to the jury. The objection to the introduction of it as evidence, will be sustained.

84 Mr. Herring: Your Honor will permit an exception.

A. Wentworth, called as a witness for the defense, duly sworn testified as follows:

I was County Recorder of Cochise County in 1895; as such Recorder I had custody of the records of said county; (Col. Herring hands book to witness) that book says Records of the California Mining District, Pima County, Arizona. It is one of the old records; Cochise County was once a part of Pima County and the records were tran-
85 scribed and kept; that book was brought to this Court by me, in 1895; it was left here with the Clerk of the Court, by order of the Judge. That book is filled with records of mining locations in my office; mining locations in that district, the original records; (Marked defendant's Exhibit No. 1.) I find this book is marked as a record of the California Mining District, it was turned over to me by my predecessor at my Recorder office, in Tombstone, Arizona, and I turned it over to the Clerk and I now received it from him; that is filed among the records of Cochise Coun-
86 ty as a record of Cochise County; the book handed me now is a record of the California Mining District, Book C and was turned over to me by my predecessor as Recorder of Cochise County and I turned it over to the Clerk of this Court and I found it there now; it is partially filled with mining locations of the California Mining District; (books marked 2 and 3).

CROSS-EXAMINATION.

87 I am not at present the County Recorder of Cochise County; my term of office expired a year and a half ago; these books were in the Court and I came over to get them; I am not the custodian of the records of Cochise County. I have read that book times enough to know

that it is a record of Cochise County; defendant's Exhibit 1 was turned over to me by my predecessor as one of the records of the office; there is no file mark on it that I 88
know of; that is true also of Exhibits 2 and 3; there are no marks of identification upon these books to show that the County Recorder ever marked them as a record of his office.

RE-DIRECT.

I never found on any of the records of this County, any file marks on the books of former records of Pima County in the office of my county; I have scores of records there; there are no marks on any of these books; these 89
books have marks of identification showing them to belong to the Recorder's office; they have marks of Cochise County on some of the pages at the top; this book is marked "California Districts"; there are no file marks on them; there are printed heads of records of deeds, bills of sale, etc.; the records of location notices and things of that kind have been filed there; I don't remember that there is anything in connection with these books 1, 2 and 3 that indicate that they belong to the recorder's office; there are no file marks on them; nothing only the descriptions writ- 90
ten in it. I know that I was in the office there when the book was turned in or when a book of that kind was turned in; I found those books there; I don't know anything about the fact of their being turned in as a record, at the time they were turned in; there is not anything in the books to indicate when they were turned in; I continued when I was County Recorder to record notices of mining locations in my books, as Recorder of the county, of the California Mining District, many of them; location notices have been recorded in this book by my predecessor and in 91
this book there are a large number of mining locations notices of the California Mining District, recorded by my predecessor. I have made thorough search in my offices, as Recorder, for the book of mining location notices for

the Chiricahua Mining District; I found no such book.

92 Col. Herring: We offer this record of the California Mining District.

M. G. Brown, called as a witness for the defendant, duly sworn, testified as follows:

My name is M. G. Brown; I reside at Tombstone, Arizona; I am the County Recorder in Cochise County; I have been Recorder since 1896; I have made diligent search for any book containing the records of the Chiricahua Mining District; such book is not in my office; I do not find it there

93 Recess until May 31, 1898, at 9 a. m.

Tucson, Arizona, May 31, 1898.

Court met; jury called; all present:

The Court: Proceed with the trial:

George R. Roscruge, being recalled on behalf of the defendant and having been heretofore duly sworn, testified as follows:

Witness: I reside at Tucson. I have been United
94 States Surveyor General for the District of Arizona; chief draughtsman in the Surveyor General's office and chief clerk; I served six years as chief draughtsman in the office; I have had experience as a surveyor since 1872; I have made surveys of public lands, mineral surveys and subdivisions of townships.

(Defendant has the same map as before offered, now on easel in court, except the mineral designations, names of mines, etc., are not now on the map.)

95 Witness: I made that map from accurate surveys and observations made by myself on the ground and certified copies of plats; township plats from the Unitel States Surveyor General's office, and the original field notes on file in that office; the township plats of the government survey

are in their positions on that map as they exist on the surface of the earth, according to the field notes and plats in the Surveyor General's office; I was in those mountains 96
making the surveys from which that map is made, for about a month; I stated that that map was made from the field notes in the Surveyor General's office and the plats there and one portion of it from my personal survey; the part of this map made from my actual survey is from the north boundary township 17 south, 29 and 30 east to the south boundary of 18 south, 29 and 30 east; in making that part of the survey, on Rock Creek, I went south to the point marked "10 Mill Setting Ross;" but on the north boundary of Tp. 17 south, I went as far as the Dunn Mine, 97
marked by No. 11.

Mr. Morrison: I move that that be stricken out.

The Court: It will not be stricken out by the Court but the jury will not consider it.

Witness: The point which I have denoted as 11 on the map, to which my actual survey was extended on the north line of tp. 17 south, 30 east, was connected by me, by actual survey, with the point maintained at the Upper Ross Mill Setting. East of the line I have just indicated, 98
passing north and south up, I made observations up to the crest of the mountains; I made these observations by going to the crest of the mountain, at the place called "Cold Spring" and I was also at the crest of the mountain at Figure No. 11; the crest of the mountain, as shown on this map is in its true position, relatively, with reference to this easterly line of my actual survey; east of the crest of the mountains, I observed a broken, rugged and precipitous country for about 5 or 6 miles east; there is a valley there, west of the mountains which I have designated as 99
Sulphur Spring Valley; on the east side there is a valley, as I have indicated, known to me as the San Simon Valley; it is known officially in the Surveyor General's office as the San Simon Valley; and this Sulphur Spring Valley is

known to me officially as the Sulphur Spring Valley; the mountains indicated north of the line (north) of tp. 17
100 south, range 30 east, continue, as I have shown on this map, to the point near the Southern Pacific; I have at times been along that Southern Pacific Railroad and along this country and know generally the location of these mountains and from my general observation these mountains are in the position designated; I have shown in the southwest the Swissholm Mountains and they are in the position where I know them to be. I have made official surveys in those mountains; with reference to that part of the mountain shown by my actual survey, the Chiricahua
101 Mountains extend in the position substantially as I have placed them upon the map. The Dos Cabesas peaks, as indicated, are substantially in the position where they exist in the mountains; where I have shown Fort Bowie military reservation, there was a reservation there commonly known as the Fort Bowie military reservation; the Round or Harris Mountain, as indicated by me on the map, was placed there from an official survey in the Surveyor General's office.

Miss Herring: The defendant offers this map in evi-
102 dence in connection and as a part of the witness Roscruge testimony, who made it and for the purpose of enabling the Court and jury to better understand and apply the evidence with reference to the various localities as to which the defendants' witnesses will testify.

The Court: Is there any objection?

Mr. Morrison: I would like to ask the witness one or two questions:

CROSS-EXAMINATION.

103

Witness: This is the same map that we had before the Court the other day; I have located what is called Rock Creek on that map; also the canon in which Rock Creek is; that map is intended to represent the ground for about

31 miles north of Rock Creek Canon and about 23 miles south and about 11 miles east, to the head of Rock Creek.

Mr. Morrison: The Government has no objection to 104
this map being used for the purpose of illustrating the testimony of the witness Roscruge. As independent testimany, standing there by itself, as a whole, there is an objection to it—as becoming independent testimony as evidence to sustain the contention of the defense of the Copper Queen Mining Company.

RE-DIRECT EXAMINATION.

The Witness: It is a fact that all of the mineral 105
lands and districts designated on the former map and mines have been obliterated; it is not the same identical map with everything on it that was offered before; it is substantially the same map with certain things obliterated; it is the same piece of paper.

The Court: I understand there is some objection to the admission of this map or plat in evidence for the purposes stated by the defendant.

Mr. Morrison: Yes; if it is to be used to illustrate the testimony of other witnesses. 106

The Court: The objection to the introduction of the map for the purposes stated is overruled and the map may be introduced for the purposes stated.

Professor Wm. B. Blake, being called on behalf of the defendant was duly sworn and testified as follows:

My name is William B. Blake; my residence is Tucson; I have lived here for three years in the present position; I have been here before; I am the director of the Arizona School of Mines, and the professor of geology and mining 107
in the University of Arizona; I was graduated from the Sheffield Scientific School, now a part of Lowell University, in the year 1852; since that year and before it, I have been actively engaged in the exploration of the mineral

deposits of the United States and some other countries; at my graduation, or directly thereafter, I was employed by
108 the U. S. Government as the geologist of the Pacific Railway Survey and served in that capacity for three or four years; since that I have been in various public positions and have had half a century, really, in experience in the examination of mineral properties and mineral deposits. I have recently been in the Chiricahua Mountains, in Cochise County and in Rock Creek and vicinity.

Q. Will you state generally the character of the rocks, the formation, the system of rocks, north and south of Rock Creek:
109

Mr. Morrison: We will object to the question for the reason that it calls for a description of lands, as I gather from question, outside of Rock Creek and Rock Creek Canon and not described in the complaint as the land from which the cutting was done. If it is intended to confine the answer to Rock Creek Canon, there is no objection. If it is intended to have the witness give a description of the character of the land north and south of Rock Creek Canon and outside of Rock Creek Canon, then we object to the testimony as incompetent, immaterial and
110 irrelevant.

The Court: The question is a general one; the objection will be overruled.

Mr. Morrison: We except.

Witness: The Chiricahua Mountains are a portion of a great uplift in the southeastern corner of Arizona Territory.

Mr. Morrison: Now, if the Court please, we object to the witness testifying about rocks of the Chiricahua Mountains as a whole, for the reason that the allegation with reference to the Chiricahua Mountains, in the answer as it originally stood, is stricken out. We object to such testimony as incompetent, irrelevant and immaterial.
111

The Court: I think that the inquiry of this witness should be directed to the geological conditions which exist in Rock Creek Canon and in the vicinity of Rock Creek Canon and the witness then state from his scientific or other means of knowledge whether or not the geological formations found, indicate mineral deposits and state them. 112

Mr. Herring: Your Honor will permit an exception on the part of the defendant.

The Witness: The formations in and along Rock Creek are divers; there are in several places, remnants of pre-existing flora or stratified formations such as limestone, and quartzite. These original stratified formations existing in parallel bodies, having been broken through by plutonic rocks. By "plutonic" I mean rocks of igneous character produced somewhere far below the surface and coming up to the surface through some other formation. In addition to these plutonic rocks, which have come up through and partly overflowed these systems, we have an outpouring of the more fluid kind of rock which spread out and covered the whole confused and broken mass. This rock which was poured out over the whole mass, we call rhyolite, coming from the words indicating to flow. Subsequently to this outpouring of semi-fluid mass of plutonic rock, some erosion; the action of storms; of the water, cutting it across and leaving the remnants of an old outflow from the top of the hills; while the streams cut below into the other and older overflow and revealing also remnants of the former flora. So today we have on Rock Creek from its mouth to its head, a variety of rocks, chiefly of plutonic origin, volcanic rocks, covering and hiding from view, the older formation. 113 114 115

Q. State whether the same conditions exist within the vicinity of Rock Creek; and what conditions you find.

Witness: Rock Creek heads in the central part of these mountains; and the conditions that I have described
116 are more distinct or more completely exhibited in the region of Rock Creek and the adjoining creek, or north or south. The result from this former more intense activity of these forces which have thrown these rocks out was, that there was a mass of plutonic or chrystallized rocks in the central portion—and makes the central portion. This central portion has been subject to erosion and decay more than the other portion. The mere fact that these rocks were coverd up by a volcanic overflow, is sufficietn to indicate that the rocks below are plutonic. Consequently, we
117 have today, in the vicinity of Rock Creek, some of the higher portions of this mountain range. As you go north and as you come south, these plutonic conditions are less vividly shown. There are fewer evidences of plutonic actions, fewer porphryitic dikes; not so great an exhibition of porphyritic rocks in the ranges north and south, as in the e higher portions of the mountains. The stratified rocks show themselves more distinct as you go north and as you go south.

As you ascend Rock Creek from its outflow in Sulphur
118 Valley Spring and get in the canon out in the same 2 miles or 2½ miles east of Taylor's ranch on the left bank of Rock Creek, the upper side of the ravine, you find distinct outcrops of stratified rocks; blue limestone; one of the remnants of the ancient foundation of the district to which I have referred. In connection with that outcrop of blue limestone, I find what miners call float; porous quartz; portions of a quartz ledge but was not able, from want of time, to follow it up to its source. Still higher up the creek we come to a region of decomposed rock (by
119 decomposed rock, I mean rock that is rotten), marked by yellow and red color and in connection with this rotten rock, several outcrops of quartz, some of which have been worked and others not. And still farther on, a considerable outcrop of very rusty red rock, which extends north

or northwesterly a little, to the head of Pino Creek, I think it is; the next great creek on the north. This red rock is a part of one of the plutonic group of rocks and is 120
extensively mineralized. It presents good indications of copper; for generally, if a large amount of rock crops out, of a red color, the red color is due to the decomposition of sulphide ores and where sulphide ores exist in quantity, there we may look for deposits of copper under the capping or cropping of decomposed rock. This red mineralized portion of country is of considerable extent and is most largely developed and worked or explored, at a point directly above one of the mill settings; I think it is Downing's Mill Setting: If you will allow me to refer to my 121
notes, I will tell you; the notes to which I refer are my field notes.

Mr. Morrison: We want the witness to locate the spot on the map.

Witness: I will locate it on the map.

Mr. Morrison: Now, for the purpose of raising that question, we object to this witness using that map for the purpose of illustrating his testimony, because he did not make that map and because it is not an official map. I 122
make the objection now for the purpose of getting a ruling upon this proposition.

Mr. Herring: (to witness) What were you about to speak of in regard to Downing's Mill Setting?

A. I will refer to my notes. I was about to speak of the point "Riggs' Old Mill"on Pine Creek where I camped; No. 8.

Mr. Morrison: I object to it until the point is shown on the map. 123

(Mr. Blake is temporarily withdrawn from the witness stand and Mr. Geo. J. Roscruge placed thereon, to locate a point on the map).

Mr. Geo. J. Roscruge, recalled for defense, had been duly sworn, testified as follows:

124 I have numbers on my mountain points.

Q. Mr. Roscruge: point out on that may any number eight which you have on that map. (Witness indicates on the map—the witness Roscruge indicates on the map.)

Mr. Morrison: I object, because there are two witnesses on the stand at once.

The Court: Mr. Roscruge is being examined only for the purpose of pointing out on the map the location of the places referred to by the witness.

125 Mr. Morrison: We except.

Mr. Herring: Show the point No. 8 on the map. (Witness indicates point 8 on the map.)

Mr. Morrison: We except.

Witness: No. 8 is on Pine Creek.

Professor Wm. B. Blake, resuming the witness stand, testified:

By Col. Herring: Were you at that point No. 8, as
126 marked on this map? A. I was.

Mr. Morrison: I may as well object at this time to any evidence with reference to this point which is marked on the map as No. 8.

George J. Roscruge, recalled for the defense, testified:

Witness: I have indicated two little crosses at point 8; there are the crosses just before the point 8.

Mr. Morrison: We object to the question it asks for an answer which will apply to land of a character of the
127 land that is outside of Rock Creek Canon.

Mr. Herring: We would like to show the distance.

The Court: Assuming that mill settings indicate saw mills.

Mr. Herring: Yes, sir; now, Mr. Roscruge, will you state the distance from the mill and mill settings of Ross in Rock Creek, to point 8, after the crosses at point 8; the 128
distance? A. A mile and a half.

The Court: For the present, you might withdraw that question and then ask it again, if you wish to make any further inquiry before a ruling is made upon it.

Col. Herring: Will you state how you came to put marks upon this map; the little points—crosses—immediately under the point 8; how it came to be marked?

Mr. Morrison: I object to the question for the reason 129
that we desire to have a ruling as to what method we shall pursue in introducing evidence in this case. Prof. Blake is on the witness stand and he has not been withdrawn. It is also apparent, it seems to me, that Mr. Roscruge is on the witness stand at the same time, testifying to this Court.

The Court: Only one witness is being examined at a time, really.

Mr. Herring: (to witness Roscruge) Why did you put point 8 there? A. Prof. Blake and Dr. Ricketts were 130
present and Mr. J. Smith seen it and I put point 8 there on the ground and that is the point where they were and I marked it upon this map to indicate the position on the ground where they were. I did this in behalf of the Copper Queen Company; I did not understand the question; I took that there as indicating that at that time there were certain parties there; Dr. Ricketts and Prof. Blake; point 8 is correct in its position upon that map as it was upon the ground.

Prof. William B. Blake, recalled, by the defence, hav- 131
ing been formerly sworn herein, testified as follows:

By Col. Herring: State what were the conditions and what you found at point No. 8, as indicated upon this map?

Mr. Morrison: We object. Point 8 is outside of the Court's ruling; the witness Roscruge states about it being
132 a mile and a half from Rock Creek Canon to that point. We object to the question as incompetent, irrelevant and immaterial; it does not tend to prove any issue in this case.

ARGUMENTS.

The Court: There seems to be some doubt as to the position of the Judge in this matter upon the question of evidence and in order to indicate what the Court will hold upon that point, I will now state that for the purpose of
133 this defense, you may show the existence of any valuable mineral deposit or indications of valuable mineral deposit upon the lands from which the timber was cut and removed or lying so closely contiguous thereto and leading and pointing in the direction thereof, that such valuable mineral indications may reasonably be considered to be directly connected with, and by its close association, to impress a mineral character upon the land referred to.

Col. Herring: The witness Roscruge stated that the point 8 was a mile and a half north of the mill setting of
134 Ross. Our question to Mr. Blake is within the ruling of the Court. Your Honor will permit an exception to be entered to the ruling of the Court as it stands. If your Honor desires that to be stated more accurately, I will call Mr. Roscruge now to testify to the distance from the line of the cutting of the timber to the point 8.

George J. Roscruge, recalled for the defense, testified as follows:

Witness: No. 10 represents the point that was visited
135 by Dr. Ricketts, Prof. Blake and myself; the mill setting is near No. 10 on the map; there was timber cut north of the mill setting, it is about a mile and a quarter to the point at No. 8; but right at this point there was timber cut, because I sat on a stump; but I don't know what timber may

have been cut over the ridge nearer the point 8; the timber appeared to be cut up the side of the mountain north of that mill setting. 136

CROSS-EXAMINATION.

I sat very near the ridge, that is to say the top of the canon to the north of Rock Creek; the point where I sat is northeast of the mill setting, near the ridge, on the north side of Rock Creek; that is as far north as I can testify the cutting was; that circular mark on the map is right on Rock Creek; right on the creek; that is on the left bank of the creek; No. 8 is over the divide in another canon and 137
there is a ridge which runs along between Rock Creek and the place or canon where 8 is.

Prof. Wm. B. Blake, recalled, having been heretofore sworn herein, testified as follows:

By Col. Herring: State what were the conditions and what you found at point 8 as indicated on this map.

Mr. Morrison: I object to the question because under this ruling of the Court, it has not been shown at this time that there is anything on that map at point 8, in any way 138
which point sto in the direction or leads in the direction of Rock Creek Canon.

The Court: The objection is overruled.

Mr. Morrison: We except.

Witness: I do not know whether it is within my privilege to say that I have already given testimony from the very point you have been discussing, for I made all my observations from Rock Creek, along a line of mineralization over to point 8 or to the head of Pine Creek. Just 139
above the figure 8, or a little southeast of the point marked Mill Setting, Dunn's Mill Setting, I found a very large and prominent exposure of red rock, discolored and soft, with oxide of iron, as I have already explained to the Court.

That red rock is about 200 feet high, I should judge; perhaps a little higher; I mean by that, it extends from the
140 face of the hill, from the creek, up the side of the canon for some 250 feet; it is very heavy, prominent exposure of mineral rock. I found a mining location indicated by a monument and a can inside, a tin can inside the monument containing the notice of location, the claim being called "Pure Stuff"; there was a cut at this location monument; and a cut above it—

Mr. Morrison: We move to strike out that part of the evidence as irrelevant; about the contents of the mining location; and the mining location is the best evidence.

141 The Court: The request of the counsel for the Government be denied.

Mr. Morrison: We except.

Witness: I found that line of formation, extending from Rock Creek Canon into the line of formation; I traced this red formation from the point about figure 8, southerly over the divide at the head of Rock Creek or upon one of the tributaries of Rock Creek; and I would like to explain, for the benefit of all, I think, that in this
142 mountain region, these creeks, as they reach you, or as they originate at the summit, are much divided and it is somewhat difficult to say just where is the head of one creek and the head of another and the distance between the drainage of one and the drainage of another is hard to determin; it is a mere line; so that in passing over from Rock Creek to the point of Dunning's millsite above figure 8, we cross a divide, and beyond that divide, these mineral indications extend; not as strong and powerful, as they are at the point figure 8, but still I believe them to be con-
143 nected and to be one and the same line of mineralization, extending between figure 8 and figure 9, figure 9 being on Rock Creek. I did not trace these mineral indications down below figure 9; at figure 9, on the divide above Rock Creek, I saw the same rotten rock as at camp and at the

summit a soft gray rock—quartz float on the hill, leading into Rock Creek Canon, leading down. I will give you point 10 in a minute; at No. 10, white quartz in layers in 144
the rock, about a quarter of a mile above the second mill setting.

Col. Herring: Will you state right there, in connection with the quartz, whether that quartz was such a quartz as a person might reasonably hope, upon development and or prospecting, to find mineral and mineral indications?

Mr. Morrison: We object to the question as incompetent for the reason that the mineral must be there, in 145
paying quantities, and must be valuable mineral deposits; also that the question is too remote; the mineral must exist in paying quantities according to the usual method of mining.

ARGUMENT.

The Court: The objection is sustained in the form it is asked.

Col. Herring: Your Honor will permit an exception; state what mineral indications, if any, you found in the 146
quartz you have referred to. A. The only mineral indications found by me were the existence of quartz veins; which is prima facie to all prospectors—

Mr. Morrison: I object. The question was answered and the witness goes on about prospectors, with something entirely irresponsive to the question.

The Court: The objection is sustained.

Col. Herring: We except.

Witness: The quartz which I found at that point indicated to me the existence of a vein which might lead to 147
some metal or contain value below.

Mr. Morrison: I move that that question and answer be stricken out; it is not within the rule.

The Court: The request of plaintiffs will be denied.

Mr. Morrison: Note an exception.

148

Mr. Herring: Professor Blake, will you state whether you found in these mountains at any place, any similar ledge where similar conditions existed at the surface which had been worked below the surface, in which mineral was found.

Mr. Morrison: I object to the question because it covers all those mountains, meaning all the Chiricahua Mountains.

Col. Herring: Take out the word mountains and say

149 anywhere.

Mr. Morrison: That we object to as being too general and not within the rule laid down by your Honor.

Mr. Ellinwood: And a further objection is that outside of the legal question, the question invades the well known rule of logic of arguing from a particular to a general conclusion.

ARGUMENTS.

150 The Court: The objection to this question will be sustained.

Mr. Herring: We except to the ruling of the court.

The Witness: I identify point No. 7; I had it here in my notebook; it was on the roadway at the side of the road leading over from the head of Turkey Creek Canon into Rock Creek; the map correctly shows the position on the earth at point 7.

Mr. Morrison: How far was that from the point where the timber was cut on the earth?

151

A. It was on the divide; the roadway the old timber road—I can't say how far that timber was cut along that roadway but it was a roadway leading from Rock Canon over to one of the heads of Turkey Creek. I suppose it to

be on the south side of the valley in which the timber was cut, at the summit of Rock Creek. It was at the head of the ascent: I think the timber was cut around there. This 152
was at an elevation of 6500 feet above the tide; a cut on the west side of the road shows a great amount of decomposition; that is, decayed rock; also the whole divide is evidence of mineralization. At No. 7 there are several streaks of decomposed ferruginous rocks; much exposing of the rocks. There is a mineral ledge at that point, No. 7; I passed up the Turkey Creek and over and then up Turkey Canon to Rock Creek; I was at point 6; that point is correctly noted on the map with reference to Turkey Creek.

153

Blake withdrawn for a time.

Thos. R. Sorron, being produced on behalf of the defense, was duly sworn and testified as follows:

I have resided in Cochise County since the spring of '60; I am familiar with the land in the Chiricahua Mountains known as Rock Creek; I have been familiar with Rock Creek since '80 or '81; I have been frequently in that creek and all over it; I know it in the mountains; I could describe it without the map; Rock Creek is the next creek 154
northwest of Turkey and Turkey Pen Creek, then going around north at the end of Turkey Pen to the summit of the moutain; Turkey Creek is a canon that rises—that is it has its outlet from the mountain immediately above the C. C. ranch which is also, I should think three quarters of a mile from the mouth to the southeast of Rock Creek. You go up Turkey Creek about two miles and a half and there is a fork called Turkey Pen, two miles and a half from the entrance of the mountain; after the entrance to the mountain, there are two or three small cattle ranches; 155
the first is B. F. Smith and C. B. Smith and then a man named Scott; from B. F. Smith's place up Turkey Creek to where that fork is, is about two miles; there is a ranch right at the fork; that is Mrs. Morse's place.

Q. Look on the map there at "Morse's Ranch" and taking Turkey Pen Canon—Turkey Creek rather, state
156 what that canon is called.

A. At that point is the upper fork, the fork north and the name is Turkey Pen and this fork there and there is Turkey Creek; you can follow Turkey Pen and go across from Turkey Pen into Rock Creek by going over the divide; that was the road when I first went up, and the only road, it was a mill road; that was the road to the saw mills; the Ross saw mills.

Q. Now go up Turkey Pen Canon and point on the
157 map where that crosses to Rock Creek? A. It would be about this point on the map (indicates on map) below the figure 7; Rock Creek is right there, coming this way; it has several heads; one would think that the main fork would come up to the northwest of Fly's Peak; (witness indicates Fly Peak on map) that is the highest peak of the mountains; the left hand fork of that main canon would come immediately beyond the side of Fly Peak to the southwest. The other fork comes up and comes in a little draw and comes up between the Heliograph Peak and the
158 backbone of the mountain; between Heliograph and Fly Peak. (Witness indicates Heliograph Peak on map.) (Witness indicates lower mill settings; Ross' mill setting.) That is in proper position on the surface of the earth with reference to crossing from Turkey Creek to Rock Creek; (Witness indicates second mill setting on map.) It is in its proper position as it is on the surface of the earth and the upper mill setting also; the northern limits of Rock Creek would be this little backbone here; at this point here, immediately below that point, Rock Creek is a semi-
159 box; you can go up part way through that box on horseback and then you have to go up on the southerly side; that box canon is just below this lower mill setting. Now, after you get into Rock Creek at that point from there up on the canon, from the lower mill setting to the upper,

there might be ten per cent. of the way where there would be room for a wagon, but there is not over ten per cent. of the distance * * * * * 160

As soon as you drop into Rock Creek Canon over the divide from thereon, from just below this mill setting, from there to the upper mill setting there is not over 10 per cent. of the distance in the canon sufficiently wide to allow of a road * * * * *

The description I have already given of the character of the bed of Rock Creek would show its limit in the direction of this point; this canon is not wide at all and the mountain is very precipitous all the way up. Either side is precipitous and passing above the upper mill setting, the road comes to that point and goes no further; going above that point if the head of Rock Creek; that is the water shed of Rock Creek; the water shed of Rock Creek comes up on the southerly fork and coming down this direction to the divide; this is the divide; * * * * 161

I have been on the ground on Rock Creek where timber has been cut; timber has been cut to the summit on the northerly side of the canon; at the middle mill setting, it was cut to the summit where the ground would allow; at the upper mill setting on the north side, the same; at the lower mill setting, on the south side the timber had been cut to the top of the ridge; to the summit; at the middle mill setting the same; at the upper mill setting it was cut to the summit, I should say; Rock Creek forks at the upper setting; there is a fork that goes to the southeast, up to the backbone of the divide of Rock Creek; timber has been cut in that fork and the log chute came nearly to the summit; the other forks are right at this setting; that is just where I mentioned, there northeast where it comes up to the summit of the mountain; it was worked there northeast and also to the northwest; when these forks reach the summit of the mountains, they form one water shed of Rock Creek; the water shed of Rock Creek is between Fly 162 163

Peak and this ridge, running down and going north; the water shed will go three quarters of the way along Helio-
164 graph Peak. As you look out through that side of the mountain from Rock Creek towards the eastern side there and then that portion northwest would come into Pinery Creek.

CROSS-EXAMINATION.

I am speaking of the southeast fork; the canon doesn't strike the main backbone of the mountain at all; it is probably a mile from the main backbone of the mountain to the head of that fork; from the head of that northeast fork
165 to the backbone of the mountain, to the best of my judgment, is about a mile and three quarters; that northeast fork widens out; it becomes the face of the mountain, along the backbone between Fly Peak and Heliograph Peak. On that face of the mountain right up it is probably a mile and from the mill setting up to that apex, it is probably a mile and three quarters; the timber was cut right to the top on the southeast fork; on the northeast it was cut to the summit; it was cut to he summit of Fly Peak; the top of the face of that peak on that side is
166 covered with a growth of stunted quaking asp wood; where these two forks unite at the last mill setting, if you take a northerly line, you won't strike the summit to the north; going north or north, a line would strike the side line, would strike the apex of Division Ridge between Pine Creek and Rock Creek; it is about a quarter of a mile from there to the mill setting; it is very steep and narrow just at the upper mill setting; from the same mill setting to the summit on the south is it probably a quarter of a mile; I couldn't say exactly what would be the distance from the south ridge to the north ridge at the second mill setting;
167 about a mile and a half I think. At the first mill setting, the distance between the north ridge and the south ridge would not exceed two miles, I don't think; at a point half way between the first and second mill settings, in some

places you take the middle and it would go a mile and a half or two miles, because some of the side canons would go clear to the apex; it might be two miles and half; I have 168
not been up all these side canons; I have never been up at the south; from the first to the upper mill settings, I have never been up any of the side canons except to the mineral ledge which is at the edg of Rock Creek and on the other side on the north| The only canons I have been up, there, are the ones this trail goes over going by the log-way from the second setting northerly and that is the only one and I think that is the only cross canon of any size then until you get to the northeast fork at the third mill setting; I am not certain in regard to that. I have 169
not been asked anything in regard to that map; I think it is probably a mile and three-quarters, in a straight line from the first mill setting to the third mill setting at the forks of the canon; but if you take the windings of the road, it is more; I couldn't say how much more; I have never walked up from the first mill setting to the third mill setting but I have ridden it several times and I think it may be two miles and a quarter; the length of what I have described as the northeast canon, to the summit of the mountain from the mill setting would be about a mile and three-quarters; the length of the southeast canon is 170
probably a mile.

Q. Now, how far down below the first mill setting was timber cut? A. I don't remember seeing any stumps below the lower mill setting with the exception of the south side. On the south side of the canon it is very steep there and the hill is not very high; that is the first bench of that hill that goes on the south side and there are some stumps probably 150 or 200 yards below the lower mill setting; there are a very few; it comes out in there on the 171
upper side of the box; there are a few stumps below the lower mill setting; right close to the mill setting would be the western boundary of the land which was cut over(and a few stumps south of that, right close to such a

line, yes sir; I was not up in any of these little side canons; in the face of those canons you could see that timber was
172 cut but I couldn't say how far up; they were very narrow. On the land between these side canons, the timber was cut. Wherever the timber growth would permit, it had been cut.

Q. You used the expression as semi-canon this morning: by that, do you mean—

Col. Herring: He said semi-box canon; that is a half a box canon.

Q. Do you mean by that that the walls were not per-
173 pendicular?

A. The walls on the north side were precipitous and came up square at the turn and on the other side there are one or two places only where you can ride up on horseback, but you have to have a pretty good horse to do it; there was no timber cut in there at all; that box is below all stumpage; yes, sir; that is below that mill setting.

Q. Well, above the first mill setting now, coming up towards the third mill setting above the first and up the forks of the canon, did you speak of that as a semi-box
174 canon? A. No, sir; I didn't mention that at all; there was no question asked me; I should say there is where this timber was cut and hauled down to the mill; I should say so yes, the logways are there.

Prof. William B. Black, recalled for the defendant, having been heretofore duly sworn, testified as follows:

Witness: At point No. 7, as indicated on the map, I found a cut on the west side of the road in the decomposed rock; it is on the map; it is on the left side of Rock
175 Creek at or near the summit and south of Rock Creek. It is on the roadway between Rock Creek and the head of Turkey Pen Creek; this decomposed rock is visible at several points for considerable distances along the summit and seems to cross the summit southward in a general line

towards points 5 and 6; the evidences of mineralization which I found at No. 7 are three several streaks of quartz, ferruginious quartz, indicative of the presence of pyrites 176
and probably of gold; these rocks are certainly mineralized there; at No. 6, which is down the slope about a mile, there are other outcroppings; they consist of a vertical ledge of quartz and salt; yellow porphyry, decomposed; ledge 24 inches wide and soft ochre substance flowing out; good defined walls; open cut 9 feet wide; its position about 100 yards north of No. 5.

Q. Did you observe any decomposition of pyrites there?

A. The ochre fluid; and that is evidence of the former 177
existence of pyrites in the gangue. I might observe that this decomposed rock in which the ledge occurred had some close resemblance to that found at figure 7, upon the south bank of Rock Creek; No. 5 is just below No. 6, upon the slope; it is upon the left bank of Turkey Pen Canon and within pistol shot of what is called the Water Trough. It is a trough for watering horses, by the roadside, and at that point, just up the hill, a short distance among the hills above the water trough is an outcrop of a quartz ledge in places; that is, the quartz is something like what is 178
called by miners "ribbon quartz"; in plates lying one alongside of the other; or what is, rather, lying alonside or in lamination. It seemed to be a structure which is sometimes called ribbon quartz. I compared it in my notes with another ledge and I remember perfectly well, what that part of the ledge was. It had thin, plate like cavities in it and these thin spaces were very much like the leaves of a book spreading through the quartz; indicative of the former existence of some kind of spar; probably of sulphate or barite or heavy spar; a mineral often found in associa- 179
tion with quartz in mineral veins.

Prof. Blake withdrawn.

George J. Roscruge, being recalled for the defendant,

and having been heretofore duly sworn, testified as follows:

180 Point 2 on the map is just a little over two miles and a quarter from the middle mill setting on Rock Creek.

Q. How far would it be from Rock Creek itself to Rock Creek Canon; not the bed of the creek but the canon, as near as you can state; how far from the top wall south of the canon, on the south side of the canon?

A. Just a mile; I was never at that point I have just mentioned, with Prof. Blake.

181 Prof. Blake, being recalled by the defendant and having been heretofore duly sworn, testified as follows:

Witness: I was at the point 2, stated by Mr. Roscruge, and as to the character of the rock there I found an amount of porphyritic rock, with a quartz ledge, on the left bank of Ward Canon, two or three hundred feet up the side of the hill from the comparatively level ground of the canon. It is called the Bolla Ledge; the ledge transverses a porphyritic rock; it is a rusty quartz containing oxide of iron, the result of the decomposition of the iron
182 pyrites, showing mineralization; it is from one to two feet wide in places; there are places in it where it is less than a foot but there are places where it is more than two feet but that is about what should be stated as to the thickness of the ledge; a foot or two; I say there are mineral impregnations at this point; I found them there; it is a mineral ledge.

Col. Herring: Will you state whether it is such a mineral ledge as, from the conditions existing in that vicinity in relation to mineral deposits, such a ledge as a per-
183 son would be justified in prospecting. Would a person be justified in prospecting such a ledge with any reasonable hope of success?

Mr. Bennett: I object to the form of the question.

Col. Herring: (Q.) Sucess in finding valuable mineral then?

184

Mr. Bennett: Objected to.

The Court: The objection is overruled.

Mr. Bennett: We except.

A. I do.

Col. Herring: Did you observe a ledge of rock in Rock Creek Canon, of a similar character of rock as that described by you at No. 2?

Mr. Bennett: Objected to as leading.

The Court: The objection will be sustained to this 185 question.

Col. Herring: We except.

Q. Professor Blake, state what resemblance if any, any in the ledges you found in Rock Creek Canon bears to the one you have just described?

Mr. Morrison: We object to that because it is pursuing the same question that was asked and ruled against this morning. He has asked this witness to pick out a particular point and seeks to patch up the testimony of 186 the witness. Let the witness testify as to the character of the rock he found in Rock Creek Canon?

The Court: The objection is overruled.

Mr. Morrison: We except to the ruling of the Court.

The Witness: The resemblance I mentioned this morning as you may see by reference to the notes, was at ledge No. 1; not to No. 2; ledge No. 1 across the peak, across Ward Canon Creek itself is on the right bank of Ward Canon, at the top of the hill and it contains the im- 187 prints of this spar like material or heavy spar. I don't remember to have seen these imprints in ledge No. 2, the Bolla ledge; at the point marked 2, I mean; at the point marked 2, I have not seen the imprints corresponding to

the imprints I saw in the ledge at the point marked 1; the float described this morning is above the limestone; but
188 none of that limestone on Rock Creek contains the same kind of imprints.

Prof. Blake withdrawn.

George J. Roscruge, being recalled for the defendant, and having been heretofore duly sworn, testified as follows:

Col. Herring: State the distance from the point at No. 1, on the map, from the middle mill setting, on Rock Creek, from the top of the mountain south of Rock Creek
189 not from the middle setting?

A. A little over three-quarters of a mile.

Prof. William B. Blake, recalled for the defendant, and having heretofore been duly sworn herein, testified as follows:

Witness: Point No. 1 is north of Ward Canon.

Mr. Morrison: How far is No. 1 from the ridge that is at the top of the hill, that leads down into Rock Creek Canon—Rock Creek?

190 A. A little over three-quarters of a mile.

Mr. Morrison: At this point, if the Court pleases, we think it proper to suggest that, under the statement as made by Prof. Blake that there are no imprints at point No. 2, which are like those in Rock Creek Canon——

Col. Herring: He did not state that.

Mr. Morrison: I say he did; there is a difference of opinion between you and me—I may be mistaken, of course, but according to the testimony of the witness, it
191 does not come within the rule and it cannot impress the land which has been cut over with a mineral character; I move to strike out the answer with regard to No. 2 for the reason that the professor's answer shows that it does not come within the rule.

The Court: The motion to strike out will be denied. 192

Mr. Morrison: We except.

Col. Herring (Q.): What is your statement with reference to the character of the rock and character of the formation at No. 2 as stated by you, having any resemblance to the formations in Rock Creek?

A. The rocks in which the ledge occurs are similar to those in Rock Creek, but I have no recollection that the quartz contains imprints like those found in the flock rock in Rock Creek. I have no recollection of seeing any imprints in the quartz on Rock Creek similar to this ledge I have spoken of, while I have recollection as regards the ledge on the opposite side of the creek. 193

Mr. Ellinwood: I object to the answer of the witness about "float rock."

The Court: The objection is overruled.

Witness: The point marked No. 1, is on the divide between Ward Canon and another ravine on the north; it is a wide quartz ledge, cutting porphyritic rocks, trending northeast, southwest, measuring all the way from 6 feet to 15 and possibly 20 feet in width; the quartz broken off at the surface has rolled down on each side so as to obscure the exact walls and it is a very heavy ledge and contains imprints of spar; I saw that this ledge is of a character as to justify a prospector with a reasonable hope of finding valuable mineral. From what I have stated and found in Rock Creek Canon and its tributaries, I say it is a mineral district, no doubt. 194

I have examined the lands in the Chiricahua Mountains contiguous to Rock Creek Canon as to their mineral formation; I passed out of Rock Creek Canon into the adjoining canons, north and south of Rock Creek Canon; on the adjoining canon north was open country. 195

Q. Now, I wish you to state what you found in Pine Canon, in relation to mineral, in the formations existing
196 there, which was similar in character to any formations in Rock Creek or Rock Creek Canon and the tributaries thereof and also state in connection therewith, what minerals, if any, were being taken out and extracted in those places in Pine Canon.

Mr. Morrison: Objected to because the question does not include that part of the rule that it would impress or affect the character of the land within the boundaries of Rock Creek Canon.

197 Mr. Ellinwood: And we have a further objection that the counsel presumes it to be similar, in his question.

The Court: The objection is overruled.

Witness: I desire to repeat my testimony this morning upon that point; that a certain belt or line of thoroughly decomposed rock, highly charged with oxide of iron and indicative of copper deposits as well as gold, extends from Rock Creek on the northern side, over along the mountains, at intervals, to Pine Creek. It is not at the summit. It crosses from one creek to the other, along
198 a ridge, so that formation is practically continuous; it is not only in Pine Creek but in Rock Creek and may be traced from one creek to the other.

George J. Roscruge, recalled, for defense; having heretofore been duly sworn testified as follows:

Witness: (Witness points to point 15 on map) No. 15 is on Pine Creek, three and a half miles north of the north arm of Rock Creek; I made that mark there, in the presence of Prof. Blake, Dr. Ricketts and Joseph Smith.

Prof. Wm. B. Blake, recalled for defense, heretofore
199 duly sworn, testified:

Col. Herirng: State, Prof. Blake, what, if anything, you found in these mountains on the ground at the point 15?

Mr. Morrison: We object to the question for the reason that there has been no attempt to show from us any relevancy whatever between Rock Creek Canon and the 200
point No. 15, which is by Gen. Roscruge said to be three and a half miles north of the north ridge of Rock Creek Canon and that it cannot possibly affect or impress this land that was cut over, with its mineral character, if it has any.

ARGUMENTS.

Mr. Morrison: We object to it as incompetent, irrelevant and immaterial.

The Court: The objection to the question will be 201
sustained.

Col. Herring: Exception for defendant.

ARGUMENTS.

Col. Herring: I will ask Prof. Blake a question and have Your Honor's ruling on those words.

(To the Witness) Prof. will you state whether at the point at 15 upon the map, in Pinery Canon, you found any mineral or mine which, from its association or the rocks in 202
which it was situated, showed that it was a similar formation to such formations as you have described as existing in Rock Creek Canon?

Mr. Morrison: Objected to as leading and not coming within Your Honor's ruling.

The Court: The objection is sustained.

Col. Herring: Your Honor will permit an exception.

(To the Witness) Prof. Blake, will you state whether you found at the point 15 in Downing Canon, any mine 203
that was opened and worked?

Mr. Morrison: I object to the question for the same reasons as before.

The Court: The objection is sustained.

Col. Herring: W excepte to the ruling of the Court.

204 (To the Witness) Professor, will you state whether you found at point fourteen in the mountains, the Chiricahua Mountains, and in township 17 south, range 30 east, whether you found a mine that was being worked for mineral in place?

Mr. Morrison: The same objection.

The Court: It is the same.

Geo. J. Roscruge, recalled, heretofore sworn, testified
205 as follows:

Point fourteen is about three-quarters of a mile from the northerly line of Rock Creek Canon, on Pinery Creek.

Prof. Wm. B. Blake, recalled, heretofore sworn, testified as follows:

By Col. Herring: Now, Prof. Blake, will you state whether at the point at 14 on the map, you found any mine being worked in valuable mineral?

Mr. Morrison: Object to the question as not coming
206 within the rule.

The Court: The objection is sustained.

Miss Herring: We except to Your Honor's ruling.

Col. Herring: Will you state if you found at that point any large quantities of valuable mineral, in place?

Mr. Morrison: The same objection as before.

The Court: The objection is sustained.

Miss Herring: We except to the ruling.

207 Geo. J. Roscruge, recalled; heretofore duly sworn, testified as follows:

The distance of point 13, on the map, from the northern line of Rock Creek Canon is just six miles.

Prof. Wm. B. Blake, recalled, and heretofore duly sworn testified as follows:

By Col. Herring: State whether at the point marked 208
on the map at 13, you found any large workings at a mine, where large quantities of valuable mineral was being extracted, at the time of your recent exploration in those mountains?

Mr. Morrison: The objection the same as before and the further objection that the witness has not shown any familiarity with the point 13 on that map.

Witness: I was at the points marked 13, 14 and 12; I don't recognize the point marked "Artel's"; I may have 209
been there but I don't remember; I found a mine being worked at point 13 when I was there recently.

Q. At which valuable ores in large quantities were being taken out?

Mr. Morrison: The same objection as before.

The Court: The objection is sustained.

Col. Herring: Note an exception.

Q. State whether you were at the point 12 on this map where valuable minerals were being extracted. 210

Mr. Morrison: The same objection as before.

The Court: The objection is sustained.

Col. Herring: We except.

George J. Roscruge, recalled, heretofore sworn, testified as follows:

The distance of point No. 11 from the north line of Rock Creek Canon is nearly six miles and a quarter.

Prof. Wm. B. Blake, recalled, heretofore duly sworn, 211
testified as follows:

I was recently at the point marked 11 on the map, in these mountains.

Col. Herring: Q. Will you state whether at the point No. 11 you found large mineral workings, large excavations for mineral and large quantities of mineral being extracted.

212

Mr. Morrison: The same objection as before.

The Court: The objection is sustained.

Col. Herring: Note an exception.

George J. Roscruge, recalled, heretofore duly sworn, testified as follows:

The distance of Buckhorn Basin from the north line of Rock Creek Canon is eleven miles and half.

213

(Examined by Mr. Morrison). North from Rock Creek Canon; Buckhorn Basin is in 16 6south, 29 east; I think it is about 11 miles; eleven and a half miles I said. I didn't state anything about No. 12, but I will tell you: A little over 6 miles.

(Examined by Col. Herring). Points 14, 15, 12 and 12 testified to by me, are in tp. 17 south, range 30 east; point 11 is in township 17 south, range 30 east.

214 (Examined by Mr. Morrison). 12 and 13 are in tp. 17 south, range 30 east; 12 and 11, yes sir; yes, sir, tp. 17 south, range 30 east.

Q. Did you say it was 11 miles?

A. I got it mixed up; the point I said was 11 miles from the north range on the north of Rock Creek Canon was Buckhorn Basin, 11 miles and a half. That is in the northern portion of tp. 15 south, range 29 east.

Prof. Wm. B. Blake, recalled, heretofore duly sworn, testified as follows:

215

By the Witness: I was recently at the point marked on the map as Buckhorn Basin, within two months, I think.

By Col. Herring: (Q.) Will you state whether you found at that basin, large excavations for mineral, large mineral workings where large quantities of valuable min- 216
eral ore had been recently extracted.

Mr. Morrison: The same objection as before; all the objections on this same line.

The Court: The objection will be sustained.

Miss Herring: We except to the ruling.

Col. Herring:

Witness: I have been at the mines of the Common Wealth Mining Company at Pearce.

217

Q. Will you state whether you found in Rock Creek, formation, a mineral formation, or surface formation, leave it mineral formation, a surface formation, similar to the surface formation of the mines of the Common Wealth Company at Pearce?

Mr. Morrison: The same objection as before and also that it is a violation of the rule adopted this morning making a comparison between one place and another.

The Court: The objection will be sustained.

Col. Herring: We except. 218

Q. Prof. Blake, you have stated that in Rock Creek you found a rhyolite formation. Will you state whether or not valuable minerals are frequently found within such formation?

Mr. Morrison: We object to that, because it is outside of Rock Creek. It is as to a formation in Rock Creek rhyolite, being indicative of valuable mineral deposits—by expert testimony as to some other part of the world. It is the same question over again in another form. The 219
same objection as to the former question.

The Court: The objection is sustained.

Col. Herring: We except to the ruling of the Court.

Q. State, Prof. Blake, whether or not the formation of the surface upon the Common Wealth mines in Cochise
220 County is similar to the formation existing in Rock Creek Canon?

Mr. Morrison: The same objection as before.

The Court: The objection is sustained.

Miss Herring: We except to Your Honor's ruling.

Q. Prof. Blake, have you examined the Great American mines in the Swisshelm Mountains in the Chiricahua Mountains?

221 A. I have.

George J. Roscruge, recalled, heretofore duly sworn, testified as follows:

Witness: The Great American mines approximately on this map are somewhere near the north line; the southeast corner of tp. 19 south, 27 east. In a direct line, that would be 12 miles from the south side of Rock Creek Canon.

(Examined by Mr. Morrison). That was the mouth of
222 the canon that I measured to; out towards Sulphur Spring Valley; yes sir, the upper rim of the Rock Creek Canon; it is about five miles from the lower mill setting on Rock Creek Canon down to the point I have been asked about.

Q. Is that in the Swisshelm district?

A. About to the lower mill setting.

Q. On Rock Creek?

A. 17 miles.

Prof. Wm. B. Blake, recalled, heretofore duly sworn,
223 testified as follows:

By Col. Herring: Now, Prof. Blake, will you state whether you found a large amount of ore upon the surface at that mine and state what you found at the surface of

that Great American mine?

Mr. Morrison: We offer the same objection made before. 224

The Court: The objection is sustained.

Miss Herring: We except to the ruling of the Court.

Col. Herring: (Q.) State whether explorations have been made in those Great American mines, of a large character and a large amount of mineral ektracted, valuable mineral?

Mr. Morrison: The same objection as before.

The Court: The objection is sustained. 225

Col. Herring: We except.

Q. Prof. will you state whether in your experience and learning as a geologist, the system of mountains in Rock Creek and immediate vicinity are of a character which conforms generally to the Chiricahua Mountains for a distance say of 12 or 15 miles north and a distance of 12 or 15 miles south of Rock Creek Canon?

Mr. Morrison: The same objection; it is immaterial and irrelevant. 226

The Court: The objection is sustained.

Miss Herring: We except to the ruling of the Court.

Col. Herring: When you started out in your testimony this morning professor, you were about to illustrate the character of the uplift on the Chiricahua Mountains; I think you were then interrupted. I ask you now, if you were then interrupted, if you will please state the character of the uplift of the Chiricahua Mountains at Rock Creek and immediate vicinity and any further indications of mineralization in connection with that uplift? 227

Mr. Morrison: We object to that question for all the other reasons that have been made before and because that was passed upon this morning when the professor was

asked that question and started to make that answer and began to refer to the Chiricahua Mountain range as a
228 whole.

The Court: You may answer that question as to the immediate vicinity and lands closely contiguous to Rock Creek Canon.

The Witness: The porphyritic and rhyolitic rocks of the central main Chiricahuas, constitute the mass of the hills of Rock Creek and of the ranges that are closely contiguous to it. There are however, outcrops of older stratified formation which come to the surface at different
229 points. These are found, not only in the valley of Rock Creek, but also in the adjoining valley of Turkey Creek. How far they extend at other portions of the region it is impossible to state, without very thorough and prolonged investigation in a very rough country. These stratified rocks, as you get away from the immediate vicinity of Rock Creek——

Mr. Morrison: We object to anything away from the immediate vicinity of Rock Creek.

The Court: You will not pass from the immediate
230 vicinity of Rock Creek in your description of the geology of that vicinity.

Col. Herring: We except to the ruling of the Court and to the language of the Court.

Q. Do you know whether there are, in the vicinity of and adjacent to the lands where the timber was cut, known and recognized mines?

Mr. Morrison: We object; it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.
231

Mr. Morrison: We except.

Mr. Morrison: We also make the same objection to this question as to the others; because it does not apply

to the lands which are within the ruling of the Court, as to how far.

232 The Court: The objection will be overruled.

Mr. Morrison: We except

Q. (By Col. Herring) Prof. Blake, do you know there are in the vicinity of and adjacent to the lands where the timber was cut, known and recognized mines?

Mr. Morrison: And the further objection that it is leading.

The Court: The objection is overruled.

Mr. Bennett: We except.

233 A. By "adjacent" if you mean 12 or 15 miles, I know of several.

Q. State what mines they are.

Mr. Morrison: Now, we object as immaterial and irrelevant.

The Court: The objection is sustained.

Col. Herring: We except. The witness is with you gentlemen.

234 CROSS-EXAMINATION.

(By Mr. Morrison)

Witness: Between the 4th and 6th of last April, I was at the lower or first mill setting in Rock Creek Canon. That was not the point where I entered Rock Creek Canon; the lower mill setting is at the head of Box Canon, where the road comes over from Turkey Pen, over the divide down to the first mill setting; we went from Turkey Penn Creek; I went into Rock Creek Canon twice during my investigation; I could not tell you how many hours I 235 was there; the first time I was in Rock Creek Canon, I was in there, I should think about two hours going down the canon or perhaps two and a half; we went down

through what is called the Box Canon. My first visit to Rock Creek Canon was, as stated, over the divide from
236 Turkey Pen and then I went immediately down and not up the creek but down the creek through the canon and my impression is that it took about two hours to go through that canon to the creek below, or two hours and a half perhaps. I will look it up if you wish it. You were in there another time from the lower mill setting up the canon (refers to note book) "April the 8th; 7 in the morning, in the saddle; reached Rock Creek at or near the second mill setting and went down as far as the point reached a few days since; then returned." Went down to
237 connect with the point I first went into the canon; went down and then back again; the first mill setting, the second mill setting and the upper mill setting; about three-quarters of an hour that I was in Rock Creek Canon above the first mill setting, the second time I went in there. I have not been in there since the second time I speak of. I can come within two or three hundred miles of telling you the area of Rock Creek Canon going from the ridge on the south to the ridge on the north and from the first mill setting up to the last mill setting. It is ten miles, more or less, from the first mill setting to the third mill
238 setting; the width of the canon, some places a mile and some places * * * * from top to top you mean * * * * * I never measured it.

Q. Will you please state, from the south ridge of Rock Creek Canon, coming down into the creek itself, and then please pass up the other side to the ridge on the north of Rock Creek Canon, from the lower mill setting on the surface of the ground and tell me of any valuable mineral deposits that you found there?

239 A. The soft decomposed rock at the ridge, on the ridge where the road extends into Rock Creek, is one; that is marked No. 7, I think; that contained valuable mineral deposits; gold probably; I don't know; it seemed to me it

would be gold rather than any other, in my opinion. I don't know that; I didn't investigate; another place was at the point farther up, leading over on the other side; up 240
the other ridge on the other side of Rock Creek going up Rock Creek on the north sid, not clear over the north ridge but under it on the ridge as you go up; in the neighborhood of point 8 on the map. There was a continuous line of mineralized rock, extending over along the ridge, the side of the ridge, leading over to Pine Creek and culminating at Pine Creek; I cant's say how valuable those mineral deposits are; I do not know; I made no explorations whatever; in the judgment of several miners, they are of value; I know nothing of it except from hearsay; I 241
saw no gold there; I saw no gold at No. 7; I saw oxide of iron; oxide of iron would pay to work in some places; I don't think it would in Rock Creek Canon; I simply made a superficial examination, in one sense, and yet where the ground had been cut into by cuts and pits, examined them also; it was somewhat below the surface; I didn't do any mining; not at all; I know a great deal about the wealth or want of wealth or the value of mineral in Rock Creek Canon.

Q. What is the value of any of the minerals then, 242
the value of the minerals at 7, or the point 7, south of 8 on the ridge coming into Rock Creek Canon, in dollars and cents.

Col. Herring: I object because it is immaterial and is not in cross-examination. He is making him his own witness.

The Court: The objection is overruled.

Col. Herring: We except to the ruling of the Court. 243

Witness: It has a prospective value to any miner who is searching for valuable mineral deposits and— That is not wholly my answer.

Q. I ask you to give me the value in dollars and cents of any valuable mineral deposits you found at point
244 7 or on the point south of point 8 on this map?

Col. Herring: Objected to as not in cross-examination.

Miss Herring: We also object to it on the ground that it is not material.

The Court: The objection is overruled.

Miss Herring: We except to the Court's ruling.

A. I made no offer for any of those locations; I don't know what the men would take for them. Perhaps
245 they might take five hundred dollars or they might want five thousand dollars. I can't tell you in dollars and cents the value of the mineral deposits in any of these points. I have made no assays; I took samples some places; I think I did at the upper place, that is where it is located, at 8; I do not know what those samples assayed.

Q. Now, remaining in Rock Creek Canon, as I have described it in detail, please tell us of or point out out the place if you can, or describe the place where you found
246 any valuable mineral deposits?

A. I refer you to my direct testimony as to number; without number, the blue limestone outcropping above Taylor's house or ranch; that is below the first mill setting; that perhaps is not within the area you have described, if you limited it to the first mill setting; limiting it to the first mill setting, coming down the creek, there is an outcrop of quartz on the opposite side of the creek, south of the creek on the left bank. In the same general line with No. 8 and that line of red rock; either No. 9 or
247 near it; yes, it is No. 10, white quartz; that is south of the creek proper and south of the second or middle mill setting; this is a quartz ledge, that is all; I didn't see any gold in the quartz ledge; I don't know if there were any other precious minerals in it; it didn't look like anything but a

gold bearing ledge; can't tell; white quartz, not very extensive; the dimensions are not mentioned; I don't remember them; I saw no work on it; I think there was no development work in the mine, I didn't see any; none noted. 248
No doubt there were walls; certainly there were walls; I didn't see any; that is not an estimate on my part; the dimensions from one wall to another, to the best of my recollection, perhaps 12 or 15 inches as a minimum; the walls were plutonic rock; I think both sides; I don't remember; I say that that white quartz would justify an expenditure of money as a mining proposition, in a mineral bearing district; yes where I found it; as an expert I would certainly recommend the expenditure of money 249
looking towards the development of a mine in that white quartz, if I were asked to examine it. I do not know the value per ton, assay or otherwise, of the valuable mineral deposit we are speaking of; I didn't assay any or have any made; I do not know of any paying mines in Rock Creek Canon; I do not know of any mines that have development work on them there; I don't remember any mining locations in Rock Creek Canon. This deposit or formation at No. 8 is in what I call rhyolite; it is a modified form of rhyolite; the cause of the modification is decomposition 250
of pyrites; oxidation of pyrites of iron or copper or both; this is indicated by the intense red color and the porous condition of the rock there; I did not see any indications of copper at No. 8; in my direct examination I said something about the red color there indicating copper; there are no indications of copper there at No. 8; I do not arrive at that from the fact that it is red color, alone; the color alone, as entirely separate from any other condition does not indicate copper; as indicative of copper in paying quantities, connected with the condition as I found it 251
there, I cannot say.

Col. Herring: That is objected to as immaterial

The Court: The objection is overruled.

Col. Herring: We except to the ruling of the Court.

252 Witness: I cannot tell you the value of the mineral deposit at No. 8; I do not know from direct observation that it has any value in copper; I do not know from its appearance, in that locality, that it has any value for iron. I have no knowledge beyond the observations which I have given you; I have no direct and positive knowledge that it has any value. There are no other points in Rock Creek, within the boundaries which you have described where I found valuable mineral deposits; allow me to look at that map; yes, I remember now, No. 9 it is on the north slope of Rock Creek Canon; on the same slope as No. 8; the line
253 of red cropping which extends up to 8; it is intended to represent the beginning coming to Rock Creek, right on the slope of Rock Creek, on that line of decomposed rock and the facts are the same in regard to the character and value of the mineral deposits shown at 8; I siad I found spar on the divide between Ward Canon and the ridge leading over to Rock Creek; I do not say there were valuable mineral deposits there, simply from the finding of spar but that was one of the indications of mineral deposits; spar is not necessarily an indication of mineral de-
254 posit but it is commonly associated with silver ores; in itself alone it is an indication of mineral deposit; the mineral deposit at this point was valuable to a prospector for development; prospective and problematical; I cannot state the value or the nature of its contents below; know nothing about it except the indications upon the surface; no development at that point, apparently; no workings that I could find; seemed to be a ledge not known, not located; I was never in that canon before last April; I have only made one investigation; I passed up and down Rock
255 Creek, went in and out and back again; the first time, I went in and down and the second time, I went in and back; I have no recollection of any indications of any development work at all, in Rock Creek Canon; at 8 there are openings and at the summit leading into Rock Creek

there are some openings, some cuts, old, I should judge; at Rock Creek Summit, a pit about six feet across an open cut it might be called rather, open at one side and perhaps 256
six feet across it; three or four feet deep; to tell how old it was would be about as difficult as to tell the value; I don't know its value or its age; the openings at 8 were an open cut at the top, an open cut about half way down and a trench or what seemed to be a trench across the ledge; it may have been cut by water alone; I don't remember the depth of the opening; the length of it was 8 or 10 feet and the width about six feet; the work in that was I should say about a year old; I can't say; you know the characteristics are very peculiar in their proclivities of age here; I 257
have testified to so many numbers that may have overlooked some openings; I think perhaps in my answer to you just now, a little way back when you asked me about the place on Rock Creek where I found evidences of mineralization or valuable deposits, I enumerated two and forgot to give you the one on the summit along by the roadside, which I have just described; that is coming from Turkey Pen into Rock Creek; I gave you just now the description of that but in answer to your former question, I forgot to mention that point, which would make three 258
points at which there are evidences of mineralization instead of two; I have just described the opening at No. 8; thata was 8 or ten feet in length; it was my thought that it was about a year old; the work at the top of he crib was not quite so bright but a little deeper, it was brighter, they had used powder up there; there had been several shots put in; the rock had been thrown out and there was quite a dump.

Recess until June 1st, at 9 a. m.

Tucson, Ariz., June 1st, 1898. 259
9 a. m.

The Court: Call the jury.

(Jury called and all answered their names.)

Col. Herring: Defendant now offers the testimony of George R. Montgomery, a witness sworn at the former
260 trial of this case. He is now deceased. His testimony is transcribed from the notes of the stenographer who was the Court reporter at that time, Mr. B. W. Tichenor and has been taken in interrogatories and cross-interrogatories on the part of the defense and the plaintiff in this case. This deposition is marked Deft.'s Exhibit F.

Mr Ellinwood: We will admit the deposition subject to the objections that may occur as to the questions and answers

Mr. Morrison: As provided in that stipulation, ob-
261 jections may be made, if we see fit, in addition to the objections made at the time the evidence was received.

Col. Herring: Any objection not made at the former trial may be made at this trial, as to any of these depositions (Reads deposition of Montgomery, as follows:)

TITLE OF THE COURT AND CAUSE:

My name is Bryan W. Tichenor, I am a law reporter (stenographer) by occupation and I live in the city of New
262 York, County and State of New York; in November, 1895, I resided in Tucson, Arizona, and was then engaged in the same occupation; I acted as official stenographer to the above court and took the testimony and other proceedings upon the trial of the above entitled case in November, 1895, and have now in my possession in the City of New York, the stenographic notes thereof so taken by me; from my notes, it appears that upon said trial Daniel D. Ross and George R. Montgomery were sworn and examined as witnesses on behalf of the defendants and hereto attached and forming part of this deposition, will be found
263 a true, full and correct transcript of the testimony given by said witnesses upon said trial, also all objections and exceptions in relation to said testimony and the rulings of the Court upon said objections and such remarks of

counsel in connection therewith as it seems proper to me to incorporate into such record. The pages hereto attached, numbered from one to thirty-three, both inclusive, 264
and entitled Exhibit A, contain the aforesaid testimony of George R. Montgomery and all thereof as given by him upon said trial, also the other matter in connection therewith as enumerated in the foregoing reply to the fourth interrogatory; and the pages hereto attached and numbered from 1 to 11, and entitled Exhibit B, contain in the aforesaid testimony of Daniel D. Ross and all thereof as given by him upon said trial also the other matter in connection therewith, as enumerated in the foregoing reply to interrogatory four; that this said transcript has been carefully 265
compared by deponent with his said original stenographic report and is in all things full, true and correct according to the best of deponent's skill and ability.

EXHIBIT A.

George R. Montgomery, a witness sworn on behalf of the defendants, testified as follows:

I live in Silver Creek, in the California Mining District, in Cochise County; I have lived in the County of Cochise and Territory of Arizona since July, 1878; I am a miner; I am engaged in mining in the Palestine Range and 266
the Chiricahua Range; I was present at an assemblage or meeting of miners in the County of Cochise for the formation of a mining district—the Chiricahua Mining District and the California Mining District.

Mr. Morrison: We now desire to enter an objection because the evidence shows that there was a meeting and there were resolutions adopted and the minutes of the meeting were reduced to writing and the resolution, if there was one adopted, was in the minutes of the meeting and would be the best evidence and not the statement of 267
one of the parties who was present at the meeting.

The Court: The objection will be overruled.

Mr. Morrison: We except.

Col. Herring (reading): The meeting was held at a place called Pony Duncan's near Dunn Springs, in the
268 Chiricahuas, on the 27th day of August, 1878, I think; at that meeting there were present A. E. Martin, Smith; Pony Duncan; John Slavin; Peter Sullivan; myself and some others that I can't recall the names of now; Leroy, Conolly, Peter Boyle and others I cannot recall; I don't remember if Mr. Kinchalla was there; A. E. Martin was chosen chairman of the meeting; Pony Duncan was chosen as secretary of the meting; it was for the purpose of forming a mining district; resolutions wer adopted, as near as I can commit them to memory, that we should form a dis-
269 trict known as the Chiricahua Mining District, commencing at the————

Mr. Morrison: The answer discloses so far as the witness is permitted to answer that he is going on to state what was done in that resolution; this shows that a resolution was adopted and a record made of it and we again renew our objection to the witness stating the contents of a resolution which was no doubt in a record. This being true, we insist upon our objection for the reason that the statement made by the witness as to the contents of the
270 resolution is not the best evidence, the best evidence being the record of the rsolution itself.

ARGUMENTS.

The Court: (Col. Herring) You must show the boundaries of this alleged mining district by the records of the meting held for the purpose of forming this district, or, upon proof that these records are lost or destroyed, then you may show the same by secondary evidence.

Col. Herring: The testimony of Brown is regarded
271 in, as far as it may be applicable to this question?

Mr. Morrison: Subject to the objection.

Col. Herring: I offer that testimony so far as counsel for the defendant has offered to make the testimony ap-

plicable. We desire that testimony of Brown be considered as offered.

272 Mr. Morrison: We object to the evidence of Brown, as it was given the other day and our objections are that it is incompetent, irrelevant and immaterial and that it is not the best evidence nor evidence in any way that can tend to establish the fact that the resolution adopted in August, 1878, fixing the boundaries of the Chiricahua Mining District was ever in his possession.

The Court: The objection to the re-introduction of the testimony of Brown for the purpose of establishing the loss of the records of the alleged Chiricahua Mining District, referred to in the testimony of Montgomery, taken 273 on the former trial of this case, is sustained.

Col. Herring: Note an exception for the defendant.

Col. Wm. Herring, sworn on behalf of the defendant, testified as follows:

I have made diligent search for the books of records of the Chiricahua Mining District; I have made numerous inquiries; I knew E. Martin Smith personally; E. Martin Smith was represented to be.

274 Mr. Morrison: We object to any statement made by Martin Smith to counsel. Now we are going to make our record, the counsel has not been interrogated; there is an associate counsel for defendant; we want to make our record.

Mr. Ellinwood: We are entitled to questions and answers.

The Court: The witness may proceed to testify.

Mr. Ellinwood: We except.

275 The Witness: I do not understand Your Honor to state that so much of the testimony of this witness Montgomery as to who were present at that meeting is ruled out?

Now, then, I have the testimony of Mr. George Montgomery and I have examined Mr. Montgomery in relation
276 to the parties who were present at the miners' meeting when the Chiricahua Mining District was formed.

Mr. Ellinwood: I object to his examination outside of the record.

The Court: The objection is overruled.

Mr. Ellinwood: We accept.

The Witness: I knew E. Martin Smith in his life time; he is now deceased; I knew Peter sullivan in his lifetime he is now deceased, the Sullivan referred to by
277 me. I know that John Dunn is not in the country and has not been for a long time. The same is true in relation to Duncan; I know that Leroy for many years has not been in the country, nor has Connelly, nor Boyle; and I now state that I have made inquiries for these persons from numerous gentlemen over this section of the country. I have caused inquiries to be made by my son, now deceased, of many persons as to these parties in relation to their being in the country and that these inquiries were made by me for the purpose of ascertaining the where-
278 abouts of the records of the Chiricahua Mining District and I have made that inquiry of the persons in question and with reference to the names of the persons I have referred to for the purpose of learning from the miners who were early in the neighborhood where this Chiricahua Mining District is alleged to have been formed and to have lived and mined in that section, to ascertain whether such a record could be found. I am satisfied from this inquiry that the record has been lost and I state—

Mr. Morrison: I object. We say the testimony is ut-
279 terly incompetent and irrelevant; it is the veriest kind of hearsay testimony and nothing else and not admissible at all * * *

The Court: The objection will be overruled and the testimony will go in for what it is worth.

Mr. Ellinwood: We except.

The Witness: I have personally asked, in relation to these records of Mr. Louis Prue who was an old soldier, at 280
Fort Bowie, now deceased. And I have asked him about making inquiries and inquiries have been returned and word received that they were unable to find these records. Mr. Prue was a client of mine and knew intimately many of these persons who have been named by me and he knew the miners well, of the district. He lived quite near the district recorder or in the vicinity of the recorder. He lived at the old Government Reservation, th first Chiricahut Reservation and he was a soldier at Fort Bowie for many years and had unusual facilities for making inquiries 281
in relation to this record of the Chiricahua Mining District and his efforts in that respect were absolutely fruitless and I know that the offers were made. The statements which I now make in relation to this matter, as a witness in this case, as an individual in this case, that the records of the Chiricahua Mining District have been lost and cannot be found after diligent search after the same, are true and are based upon the positive statemnts of those who made thorough search.

Mr. Morrison: I move to strike that answer out; it is 282
hearsay.

The Court: The objection will be sustained.

Miss Herring: We except.

Col. Herring: Now, in connection with this testimony, I offer the evidence of George R. Montgomery upon the subject of that meeting held by miners, at a place known as Pony Duncan's near Dunn Springs, in the Chiricahut Mountains, on the 27th day of August, 1878:

"Q. Who was present at the meeting, if you know? 283

E. Martin Smith, Pony Duncan, John Dunn, John Slavin, Peter Sullivan and myself and some others that I can't recall the names of now; Leroy, Connelly and others

that I can't recall the names of now; Peter Boyle; I never charged my memory with it.

284 Q. Do you know if Mr. Kinchalla was there?

A. I don't remember.

Q. Will you state what was done at that meeting?

A. E. Martin Smith was chosen chairman of the meeting; Pony Duncan was chosen as secretary of the meeting. It was for the purpose of forming a mining district and at that meeting the Chiricahua Mining District was formed."

285 Mr. Morrison: I have no objection to make to the testimony so far as the gentleman has gone.

Col. Herring: It is conceded that the testimony just read is in. Now, upon the testimony in relation to the loss of the records and upon the testimony just read. I now offer the testimony of George R. Montgomery as to the bounds of the Chiricahua Mining District.

Mr. Bennett: If the Court please, we object for the reason that the loss of the original resolution has not been
286 established.

Mr. Ellinwood: Another objection is that were this record to be introduced, it would be incompetent, irrelevant and immaterial.

Col. Herring: (Reads from the deposition of Montgomery):

"Q. Mr. Montgomery, do you know the boundaries of the Chiricahua Mining District?

287 "A. I do; I will state them here and then go to the map; I can state them from the map (takes pointer). This (indicating) being Fort Bowie the line is supposed to start from this corner of the reservation. The minutes of the meeting read in this way——"

The Court: All the testimony contained in that transcript of the witness Montgomery, showing or tending to show the boundaries of the Chiricahua Mining District, will be stricken out as irrelevant. 288

Miss Herring: We except, Your Honor, and in order to get the benefit of our exception we will state that we propose to prove by the testimony of the witness Montgomery that the lands where the timber was cut are within an organized mining district known as the Chiricahua Mining District.

Col. Herring: Your Honor rejects this offer?

The Court: Yes, sir. 289

Col. Herring: We except.

(Reads from page 4 of the deposition): "Which of these two districts was first formed; do you know?"

Mr. Morrison: We object to the question for the reason that it is a conclusion now, so far as this witness is concerned, that any districts were formed.

Mr. Bennett: We also object because it is not responsive to the question. The question is "Do you know" and he does not say whether he does or not. 290

The Court: The objection will be overruled to that question.

Mr. Bennett: We except.

Col. Herring: (Resumes reading): "I have been engaged in mining about 28 years.

"Q. And during your residence in the County of Cochise will you state how frequently you have been over the Chiricahua Mining District or the California Mining District?" 291

By Mr. Morrison: We object to the question because there is no proof of the California Mining District or where the California Mining District is and there is no

evidence to show where the Chiricahua Mining District is, at this time.

292 The Court: The objecton is sustained.

Col. Herring: We except. (Resumes reading from deposition):

"Q. I am not speaking of the last year, but since you have been in the country?

"A. I couldn't say but a great many times; I couldn't say but I have been over it a great, great many times, I say."

293 Mr. Morrison: The same objection.

The Court: The objection is sustained.

Miss Herring: We except.

Col. Herring (Resuming): "I have been engaged in prospecting in going over these mountains.

"Q. Where have you prospected in the California Mining District?"

Mr. Morrison: The same objection.

294 Col. Herring: Counsel for defendant offers in evidence a book endorsed "Records of the California Mining District, Pima County, Arizona."

Mr. Morrison: We object to the book; the book speaks for itself and counsel has no right to read from or any of the contents of that book.

Col. Herring: This is a book which contains the minutes of the mining meeting referred to. It is headed California Mining District, Pima County, Arizona.

"California Mining District. Proceedings of a miners'
295 meeting to be held at Leroy's camp, Silver Creek, Pima County, Arizona, on the 7th of September, 1878. By virtue of a notice duly signed and posted at three prominent places in a proposed mining district, dated August 24,

1878, a meeting of miners was held at the above named camp on the date first above written. Mr. C. A. Milner was chosen chairman and David P. Carr secretary of the 296
meeting. A mining district was then formed and organized to be called and known as the California Mining District." It is signed by C. A. Milner, Chairman; David P. Carr, Secretary; Wm. T. Harris, miner; Victor Van Hob, miner; G. R. Montgomery, miner; D. C. Leroy, miner; Lorenzo Iraton, miner; Alex. Neal, miner, and E. Martin Smith.

Mr. Morrison: We object to the testimony of Mr. Wentworth; we object to the introduction of this record for the reason that if this is an original record properly in 297
the office of the County Recorder, then the record has not been verified or proven in any way; this is an original instrument.

The Court: Your objection goes to this particular part of the book which is entitled California Mining District and those original signatures.

Mr. Morrison: Yes sir.

ARGUMENTS

Col. Herring, heretofore sworn, testified as follows, on 298
behalf of defendant:

I knew George R. Montgomery in his life time, well.

Mr. Morrison: Then if the gentleman withdraws his former testimony in this regard, we will withdraw our former objection and make another objection with the new matter.

Col. Herring: That will be the understanding.

Witness: I knew George R. Montgomery in his life 299
time, well; I had frequent interviews with him and correspondence with him and have seen him write. I knew that the signature here in this book offered, that the signature of George R. Montgomery is the signature of

George R. Montgomery. I also knew E. Martin Smith well in his lifetime and he was not only my friend but the
300 intimate friend of my deceased brother; they were miners together and associated together; I have frequently seen him write. I have seen him write his name to letters and I have seen him write his name to checks. He has written his name repeatedly to checks, in my presence; I know the signature in this book of E. Martin Smith, is the signature of E. Martin Smith.

Now I offer this same book in evidence as a record of those minutes; these men were miners, both of them, Mr. E. Martin Smith was extensively engaged in mining, not
301 only in Arizona but in Sonora.

CROSS-EXAMINATION.

I do not know the other parties' signatures whose names are attached to that paper; I never knew W. T. Harris; Victor Van Hall; D. C. Leroy; Alexander Monlean; Lorenzo Ireton; Alexander Neal; there is no signature attached to those minutes of Millner; that is printed; there is no signature of C. A. Millner, chairman to that
302 paper; there is no signature of David B. Carr there, that too is printed.

Col. Herring: Your Honor, I now offer in evidence the record of the minutes of the proceedings of the miners' meeting at Leroy's camp, Silver Creek, Pima County, Arizona, on the 7th day of September, 1878, at the forming of the California Mining District.

Mr. Morrison: Plaintiff objects because the execution has not been proven except as to the signature of only 2
303 out of 8 names that are signed to these minutes. Further that the name of the chairman has not had a suggestion of proof that it was the name of the chairman and that the name of Carr has not been at all proven to be Carr who was the secretary.

ARGUMENTS.

The Court: The objection to the introduction of the testimony, the record, as evidence in this case, so far as the same is based upon the want of verification of the proceedings entitled the California Mining District will be overruled. 304

Mr. Ellinwood: We except.

Mr. Bennett: There is also an objection, Your Honor, upon the ground of its irrelevancy; it does not come within the rule of the Court.

Mr. Morrison: I certainly make the other objection; and say that it is incompetent, irrelevant and immaterial, for the reason that it does not tend to establish the mineral character of the land from which the timber was aken. 305

ARGUMENTS.

The Court: I prefer to consider this question a little before passing upon it and as it is now noon, we will take a recess.

Prof. Wm. R. Blake, recalled by Mr. Morrison for further cross-examination:

On my direct examination yesterday I said that there was a mining location at the figure 8 on the map; the name was probably misspelled and was intended to be "Pure Stuff"; it was dated February 17, 1898. 306

RE-DIRECT EXAMINATION.

By Col. Herring: Q. You stated that you found known and recognized mines in the district eleven and a half miles from Rock Creek Canon; will you now state whether or not you found any known or recognized mines or valuable mineral deposits other than you have already testified to nearer Rock Creek than the distance mentioned? 307

A. I did.

Mr. Morrison: Now we object to the question because it is too indefinite and uncertain * * * any
308 distance between 12 and fifteen miles of Rock Creek Canon.

The Court: The objection is sustained.

Miss Herring: We except to the ruling of the Court.

Col. Herring: Q. Prof., will you state whether you found any known or recognized mines or valuable mineral deposits other than you have already testified to in tp. 17 south, range 30 east, Gila and Salt River Meridian.

Mr. Morrison: I object to the question because it is
309 indefinite and uncertain and for the further reason that it does not in any way show that the known or recognized mines are within the ruling of the Court as to what land must be testified to.

ARGUMENT.

The Court: The objection will be overruled.

Mr. Morrison: We except.

A. I did. At the point marked on the map 15, and
310 at 14, 13 and 12.

Mr. Bennett: We move to strike that out.

The Court: I think the witness testified concerning those same points yesterday.

Col. Herring: Exception.

Argument as to admission of boundary of mining district.

The Court: The objection to the introduction of the record of boundary of so-called mining district will be
311 sustained.

Exception.

Miss Herring: We offer to prove by the testimony as to the boundary of the California Mining District, that

closely contiguous to the land whereon the timber was cut is the California Mining District.

312 The Court: That offer is refused.

Exception.

Col. Herring: (Reads Montgomery deposition): "I know Pine and Pinery Canon on this map and on Rock Creek; I have been on Rock Creek, the character of the country there is rough and broken; an abrupt country; I know that from my experience as a prospector and a United States guide; I have never been through there with pack trains; I have been through the foot of the Creek with pack trains; the foot of Rock Creek and Pinery and 313 Pine down on the foothills there; the character of the country on each side of Rock Creek is very rugged; the character of the country on the divide between Rock Creek and Pine Canon? Sharp backbone; the plateau on top is 150 yards wide, I think.

Q. What is the character of the country between Pine and Pinery Canon?

A. All broken up, worse than the other.

Objection.

314 Sustained.

Exception.

Q. What is the character of the country from the divide on top of the mountain in the vicinity of Rock Creek, to the easterly slope towards Gayleyville?

Objection; sustained; exception.

From Bowie to Rucker there are four trails; there are two wagon roads across the mountains from the San Simon to the Sulphur Spring Valley side; Fort Bowie to 315 Camp Rucker; these roads are not within the California Mining District; the Rucker road is south; the Fort Bowie road is north; no other practical roads over those mountains.

Q. Have you ever prospected Pinery Canon?

316 Objection; sustained; exception.

And to what extent have you prospected Pinery Canon?

Objection; sustained; exception.

Did you find mineral in there?

Objection; sustained; exception.

What mineral did you find in there?

To what extent did you work in there?

317 Objection; sustained; exception.

At the time you were prospecting in there when was that about, do you remember?

Objection; sustained; exception.

At that time, were there any other prospectors prospecting in there?

Objection; sustained; exception.

About how many?

318 Objection; sustained; exception.

Now at any other time, have you prospected in Pinery Canon?

Objection; sustained; exception.

Will you state how recently you have been in there?

Objection; sustained; exception

What did you go in there for?

Objection; sustained; exception.

319 What ledge is that?

Objection; sustained; exception.

Col. Herring: (Reading answer): It is free gold in Rock Creek and we thought it must come from the ledge.

Objected to as not responsive to question; sustained; exception.

320 What creek? A. Rock Creek.

Objected to because it is not connected; sustained; exception.

Witness: I went into Rock Creek and prospected then, not over four or five miles from the last mill setting of Ross. I was there prospecting for gold Friday to the following Thursday.

Q. You say there was free gold in there? A. Yes, sir.

321 Objected to as leading; object to counsel putting in what the Court has ruled out and saying that it is in.

Overruled.

Exception.

There is free gold there; I found it from panning that red clay which is probably down a mile and a half from the divide; it would be southwest of the divide; this red clay is a wash formation and formed into just common red clay with a good deal of black sand and pyrites of iron in it and gold and now and then you will find a small 322 garnet in it.

Q. Do you know of any other parties prospecting in there for gold?

Objected to as leading and suggestive and asking what other parties did? Overruled; exception.

A. Yes sir; I couldn't say that; there has been prospecting done for years in the mountains for gold.

Same objection; same ruling; exception.

323 Yes sir, in Rock Creek; I know that as a fact; I will state how I came to be prospecting for gold; when we came in there, I found a rocker and above it the graves of two men and we were told that they were in there

rocking for gold and were killed by the Indians.

324 Objection sustained to what they were told; exception.

We found a rocker and two graves about fifty yards from there, in 1878; not over three miles from the mill setting; a little south of west; this gold belt or clay seam or deposit seems to me to run into Pine Canon and we traced it into Pine as far as we could. Traced it about seven or eight hundred feet approximately; we sunk several little holes. I have prospected the big blow out of quartz a little over to the northeast of Rock Creek; no great distance about three-quarters of a mile; we sunk several little holes. I have prospected the big blow out of
325 quartz a little over to the northeast of Rock Creek; no great distance about three-quarters of a mile; we sunk down three or four feet and run a cut in a little distance to get underneath the surface. That ledge itself, that white quartz don't contain any mineral but there is a ledge underneath that runs alongside of it about a foot or 18 inches, with talc and the ledge on the southeast side of it contains mineral; silver and gold both but the gold wasn't in paying quantities to work and this was all we were hunting for. That ledge underneath is of such a character
326 as to justify reasonable prospecting and locating. I am going to spend some money on it myself.

Q. Have you ever mined in Pine Canon or prospected there?

Objected to for the same reason as before; overruled; exception.

Yes sir; all along up the canon. I prospected to see if I could find any mineral; I found nothing to speak of; that was in 1884, I think. There were a good many iron dykes, that is quite a few; probably underneath them there
327 might be other metals; I have not prospected south of Rock Creek in the Chiricahua District. I have never been in Morse Canon, Ward Canon or Salisbury Canon. I have been on some of the ground where Ross cut the timber;

the country is rough, quite rough; there were some little plateaux that he cut on that was level but they were small and the rest of it was a deep wash canon to cross and so on. 328

Q. Is it not a fact, ever since you have been in the country that this section of country between the red lines in the Chiricahua Mountains has been commonly known as a mineral country, as a mineral region.

Objection; sustained; exception.

The country over which the timber cut, could not be used for anything but timber and minerals except to persons who wanted a large amount of timber and who were willing to spend a large amount of money to build 329 a road so that they could get the timber; a private individual, say with $2,000.00 capital, could not touch the timber.

Q. What would the timber be worth without its use for mining?

Objected to as irrelevant; sustained; exception.

Q. And has there been any? No sir, there has not, but I don't know but what might be done that would make it valuable but the mining. There is a great deal of grass in the mountains but it is not valuable for grazing pur- 330 poses.

Objected to because it is not responsive; overruled: exception.

"You can't get the cattle out when they are there; all the increase is, at least a large percentage of them would be devoured by the wild animals; that is why I say you cannot get them out without going to great expense, a greater expense than the stock is really worth.

Q. Is there any grass of any appreciable quantity or 331 value in the section where the timber was cut?

Objected to as leading; overruled; exception.

No sir, well, right where the timber was cut there is

no grass there that is valuable, because it is pine grass and that is not good for anything; it's sour grass.

332 Q. Now is there a single head of stock that ranges in this district where the timber was cut between the two red lines that you know of, any cattle there, or is anybody using it as a cattle range?

Objected to; sustained; exception.

Q. Has it ever been used as a cattle range?

Objection: Court's former ruling withdrawn and objection withdrawn.

333 No, there is not a single head of stock that ranges in this district where the timber was cut, between the two red lines; it has never been used as a cattle range since I have been here.

CROSS-EXAMINATION.

I have done little but prospecting since I have been in the country; I am a machinist by trade.

Q. I am talking about down south of that line, what place did you ever seen a hole 2 feet deep in that country
334 between those two lines on the Sulphur Spring Valley side?

A. I can't say of any, not right in there where you confine me to; I first heard of that gold on Rock Creek in 1887; I first heard of it at Globe at the Miamee; I mean in 1878; I went up there in July, 1878; when I saw the rocker and two graves was in the fall of the same year; September; I saw no amount of gold come out probably but I saw two or three colors; the best I ever saw was probably two bits; I was there three months; pretty near
335 that; I am not speaking of the amount I got to the pan.

Q. How many pans did you get two bits out of that whole time?

Objected to, immaterial; overruled; exception.

Once we had a nugget about that amount. We got that in this place I told you of a little off the creek that I was telling you about. Three or four miles from the 336
last mill site.

Q. That is in the red clay that you are speaking of.

A. * * * * *

Q. How far from the last mill site? I should not think over three or four miles.

Motion to strike out, irrelevant and immaterial; denied; exception.

That is the red clay I was speaking of; I got it out there; we were more successful after we seen where the 337
ore came from; it is not a fact that we were asked to go up there to see if we could find mineral indications; never went up there for that purpose; the ledge that I have spoken of at the big blow-out is pretty well on the apex, not over a third of a mile to the very high peak there; there we found gold, silver and lead; that is the one I am going to locate. We did locate it when up there but did not record it; I have already recorded it; when I was up there last time, yes sir; two claims; I didn't say there was a ledge underlying the big blow-out; I say the blow-out 338
is on the northwest side of the ledge and that ledge is a distinct ledge on the southeast side of the blow-out that runs along. Probably six or eight inches from the blow-out; yes sir; the ledge lies against the blow-out and runs parallel with it.

Q. Do you know of anything that would pay under the circumstances?

Objection; sustained; exception.

Q. That is on the other side of the mountain. A. 339
Yes sir a great deal of prospecting is going on there and a great many shafts sunk.

Witness: It is about seven or eight miles from the place by the trail where we were working down to the last

mill setting in Rock Creek Canon; grass is not good for grazing in that country; in the pine timber it is not good;
340 large number of sheep grazing over that country; I have seen them in there but not where you asked me first. Up on the Cold Spring Flat; not in Rock Creek Canon. I never saw them clear down in Rock Creek Canon on this side; the character of the country as you come up to the great backbone from Rock Creek is a belt of pine and some grass on it and then you come down to the dense flocks of quaking ash, very thick; it has fell down so in places that it is from 8 to 10 feet high; on both sides of the mountain and you cannot get through it hardly and there
341 are trails that run through this quaking ash; that runs clear from he head of Turkey to the north fork of Cave; Cave Canon; it has four forks; the plateau on the summit of the mountain is 250 to a thousand yards wide; it is widest at Cold Spring; it can't be over a thousand yards; we have to understand each other better as to what a plateau is; for instance say mountains rise up abrupt like that and there is a level spot and then it breaks down on this side again, I call that level part the plateau; I would call it so if it was an angle that a man could ride down
342 with a horse; the timber there is scattered; a large amount of timber has been cut in Rock Creek Canon; the country I have described on the Sulphur Spring Valley side and in Rock Creek Canon, as to being more valuable for the mineral there is in it or the grass and trees growing on it, I should say I don't consider either of them at present worth a cent. At the time, the timber was cut, I am unable to answer the question; I should think it was just as good timber to go to Tombstone as to go to Bisbee; I say the mineral in that country ain't worth a cent at present; it was during the last six or eight years.

343 Q. How did it decrease in value?

Objection, immaterial, incompetent and irrelevant; does not refer to Rock Creek country; overruled; exception.

Because a big ledge that runs in there carries eighteen ounces in silver and at the price that silver is now, they would not give us anything, because silver isn't worth 344
anything. Well, the silver won't pay; the gold will pay; if that ledge will run as I understand it will now and we are satisfied that it will run $17.00 that will pay because there is plenty of water there; that ledge is on both sides; it comes across the moutains; it crosses the top of the mountain at that high peak, what is known as the Telephone Peak by the military; it would be in a southwesterly direction from Gayleyville; it is right above Cold Spring.

That is all. 345

Col. Herring: Now, I shall reserve the proof in relation to Cold Spring.

Edward John Hands, called as witness on behalf defense, being duly sworn, deposes and testified as follows:

My name is Edward John Hands; I live in Cochise county; I have lived in the Chiricahua Mountains off and on since 1887, the fall; I am thoroughly acquainted with the Chiricahua Mountains at the head of Rock Creek; I 346
am perfectly acquainted with the mountains as they pass over from Rock Creek on the San Simon side; I know where Cold Spring is situated; I should take it to be 150 or 200 yards from the summit of the mountains; on the San Simon side. There is a ledge which crosses the mountains from one side to the other, near Cold Spring; I could not swear to this ledge being the head of Rock Creek, but from my observation, I should say it to be.

CROSS-EXAMINATION.

347

I have not examined this map; I do not know that it shows on this map to be at the head of no creek.

Mr. Bennett: (To the Court) We submit the map.

Witness: I have seen the map but never to examine it: I see the point on that map marked Cold Spring; that
348 is the place that I testified to a little while ago, I should judge.

Q. You do not know whether or not it is at the head of Rock Creek or Pine Creek? A. That is what I understood.

RE-DIRECT EXAMINATION.

Those springs head in together very close; there are very sharp, narrow ridges between the different creeks; a great many creeks head up there together close to those
349 two peaks and close to these cold springs.

Mr. Bennett: We move to strike out that, on the ground that the counsel has not connected the testimony with Rock Creek or the head of Rock Creek, as he said he would.

ARGUMENTS.

Motion denied; exceptions.

Daniel D. Ross, formerly one of the defendants, when called in his own behalf on a former trial, duly sworn, tes-
350 tified as follows (Testimony read by stipulation on the trial at this time):

I am one of the defendants in the case; I know the Chiricahua Mountains; I know and I have cut timber in Rock Creek. I moved into Rock Creek and began to cut timber there is April, 1887.

Q. What kind of lands did you cut timber on?

Objected to as calling for a conclusion; overruled; exception.

351

A. On mining lands; unsurveyed; I never cut timber on surveyed lands; I know where the eastern boundary of the surveyed land is; I have seen the corners; on the Sulphur Spring side of the mountain; I made inquiries of a

surveyor about it; Theodore White; I cut timber over the summit of the Chiricahua Mountains, on Rock Creek; in cutting timber there I have not cut any trees less than 352
eight inches in diameter, not for sawing in the mill; I have cut some in the logging road—small trees; for skids and to get them out of the way to get a road in; they were in the way; I burned the tops of the trees; I burned them to get them out of the way on account of fires and burning the rest of the timber; I don't know whether as a matter of fact the Copper Queen Consolidated Mining Company has cut any timber in Rock Creek; they did not while I was there; not that I have any knowledge of. In the pine timber belt, about 13 miles long north and south and 353
east and west about six or seven miles, the grass is very poor; pine grass; stock can't eat it; it goes sour; stock only eat it just when it is coming out of the ground; an average width of the timber belt is about six miles; the grass there furnishes no opportunity for pasture there that I know of; I had to ship in hay for my own animals; I never fed them on the grass; to obtain water for mill purposes, I sunk a well; I used the water for steam power, for watering the animals of mine, I had a trough there; there was a little spring in the side of the mountain; and I used to run down a little flume, about half a mile from the last 354
mill setting; at times there is water running up Rock Creek; the spring of the year and the winter there is water running in the creek; there is not sufficient water running in the creek for any irrigation of farming of any extent; the timber delivered by me to the Copper Queen Mining Company was delivered for mining purposes; it was sold for such purpose to them.

Q. What is the general reputation of that country where you cut the timber, what is it commonly reputed to 355
be?

Objection; the character of the land cannot be established by reputation; further ground that reputation or what he heard does not prove or tend to prove the actual

knowledge on his part with which he is charged.

Overruled; exception.

356 A. Well, I heard it was mineral land; in fact I looked it over myself and considered it a mineral region; it looked like mineral all over; in fact, I pulverized some rock and horned it up and got colors of gold. I have seen works northwest from the first mill set, seen shafts there forty or fifty feet long and tunnels forty or fifty feet, about a mile and a half northwest from where I cut the timber above the lower mill setting.

Objection and motion to strike, reason that he is
357 charged with absolute knowledge and what he believed, thought or intended should be stricken out.

Denied. Exception.

CROSS-EXAMINATION.

I became convinced that that was mineral land two years before I went in there. About April 18, 1894, I remember seeing a Mr. Hood up at my mill. I recollect Mr. Bowman, I don't remember the year, 1889 or 1890; there was a young man along with him, I don't recall his name;
358 I did not say, at that time, and in that conversation and in the presence of Mr. Hood affirmatively say to him when he asked your right to cut on this land, that you didn't know if there was any mineral there or not; I never told him that I didn't know where any mineral was in that canon at that time; because I know there was; I did not tell him that. I don't know the name of the mine where I saw the work before I commenced; it is northwest from the lower mill setting; on the divide between Rock Creek and Pinery, about a mile and a half northwest from where I cut the timber; I commenced to cut there in 1887; I quit
359 cutting in August; I quit cutting timber off the ground in June 26th, 1893; the timber that I cut was sawed up in the mill and sold to the Copper Queen Company; I delivered it to them at Bisbee; I cut a good many of the trees

myself; I didn't haul it to Bisbee myself; as contractor, I delivered that timber to the Copper Queen Company at Bisbee; I cannot tell the amount of timber, from my 360
record, cut from February 13, 1893, to June 26th, 1893; my sales were not confined to the Copper Queen Co.

Charles Gategens, called as a witness for the defense, was duly sworn and testified as follows:

I live near Fairbanks, in Cochise County, Arizona; I am engaged in farming and mining; in 1879, I was engaged in mining. I have been mining more or less since I got here; I had been mining before I came to this country; in New Mexico; I know Rock Creek; I was there in 1880 and 1881; I prospected there for placering and also for 361
ledges; I found gold in the bed of the creek and along the bed; the first time, I was in there about three weeks; there were other parties with me; in 1881, I was prospecting there along the bed of the creek; besides prospecting for placering, I prospected for ledges and made a couple of locations; yes, of mining ledges; that was in 1880; before that time, I prospected all over the mountains; yes those mountains and also the Dos Camesas mountains; the reason I located ledges in Rock Creek was that I found Galena, lead and silver in it; in 1880 I didn't see other 362
miners prospecting in there at Rock Creek; a man by the name of Dannie Shafer was with me.

Q. As a miner or prospector, will you say whether the lands in Rock Creek are mineral lands?

Objection; asking for a conclusion; not qualified as an expert; overruled; exception.

A. I think it is mineral land; yes; I took it for that.

CROSS-EXAMINATION. 363

In the way of development work, I sunk little holes, a couple. About three or four feet deep; that was in 1880; we went back in 1881 and shovelled around a little on

those holes we worked before; we worked there, we did not sink them much deeper; we never made any further
364 development there on those holes; they are about a mile and a half below the first mill setting; down below the first mill setting; the lower mill setting I mean; there we found a sort of honeycomb rock; quartz and reddish looking rock; it looked as if it were between walls there was a ledge there; it run right up on a wall; it was between walls; I don't remember if there was porphyry on both sides, but I think so; if it was not porphyry on both sides, the other side was granite; I have forgotten about that; we only did work there in sinking one or two holes; we did work along
365 the creek; right at that place, that is all; we made a location with that work; I have forgotten what we called it; that was in 1880; we did not continue our development work because the water gave out on us; right at that time, we couldn't do any more work on it because we didn't have nothing to eat; the grub gave out and I had to work somewhere else to make a little something for wages; I went back in 1881; then we didn't work on the ledge; we found there was gold in the canon and we went back to try placering in the creek; we went in the immediate
366 neighborhood of the work we did in 1880 but we didn't do any more work on it; I went to work somewhere else; right there at the holes, it didn't look just like paying rock but we thought that it would; we had to leave there; I am talking about 1881; I never found anything above the lower mill setting; I didn't try; I don't know whether we prospected in there at all or not; yet, we went above; I don't think we found anything; it was too rough; we had no way of trying; it was so rough that we didn't go up there with the animals but went afoot; I took one canon any my partner took the other and we prospected; above
367 the lower mill setting I have spoken of, we found gold close there; we found gold there; below the mill setting is where we found the most; we tried farther up the canon, up above the mill setting; we just had a pan, a shovel and

a rifle along; we did pan a great deal; with reference to the lower mill setting, we panned about two or three miles up the canon; I don't know how many pans we worked; 368
we worked some, yes, we tried; we washed; more than one pan, we tried a great deal; above the lower mill setting; we were in Rock Creek above the lower mill setting about several days, up and down; yes, in different canons, I don't know exactly there are so many canons there; I know it was Rock Creek.

RE-DIRECT EXAMINATION.

I am speaking of 1881; and we prospected that for gold; in 1880 I do not know whether we prospected above 369
the lower mill setting or not I couldn't tell you of any valuable mineral deposit in Rock Creek above the lower mill setting; we found colors there; I didn't see any valuable mineral deposit; we searched for it yes, that was what we were in there for; the colors we got above the lower mill setting, I guess we throwed them back again; I didn't get very many but we got colors; then we came out of there; we did not come out of Rock Creek because we didn't find anything in there above the lower mill setting that was worth mining; we came out of there but we would 370
have stayed longer but our grub gave out and we couldn't stay any longer and we had to go to Fort Bowie to work while to get some grub; I have been back there since 1881, but not prospecting; afterwards I had a ranch near Dos Cabesas; in 1881 my ranch was 25 miles from Rock Creek Canon; after, I moved over and had my ranch right below Rock Creek or rather on Turkey Creek above the home ranch; I was then about nineteen miles from the lower mill setting on Rock Creek.

Fred Christopher Grouer, called as a witness on be- 371
half of the defense, duly sworn, testified as follows:

I reside in the mount on Pinery Canon; I am engaged in raising cattle; I have been engaged in mining some, a little, yes sir; I mined a little in New Mexico and a little

in Arizona; in Arizona, around the Chiricahua Mountains: I have known those mountains nineteen years; during all
372 those years, I have known Rock Creek Canon; I first knew Rock Creek Canon in 1880; I was prospecting in Rock Creek Canon in 1880; prospecting for placer gold I found some colors; I was in there in May, 1880 about; Mr. Laubley was with me; we were right below the first mill setting, as you call it now; but then that mill wasn't setting there; right in the gorge below it; I was in there about a month; we hunted and prospected both; I am now mining in the Chiricahuas some, up at the head of Pinery Canon; I have a mine there; it is on this slope a little bit the other
373 side of the summit; I know of one or two mineral ledges on Pine Creek; on the right hand side as you go up; on the south side; they are kind of quartz ledges; red, decomposed quartz; I am no miner but it is a kind of decomposed quartz; a tunnel was run in about 80 feet; there is other work; a shaft about forty feet on one of them; I found limestone in Rock Creek; right above the old Teddy Fitch's place; it looked like limestone in place.

CROSS-EXAMINATION.

374 That was in Rock Creek; I know where Ross' first mill setting was; I know where the second and third mill settings are; I saw that limestone 25 or 30 times riding over it on horseback; no mineral in it that I know of it was limestone; I don't know what limestone is; there is nothing in it that I know of; I never had it assayed I never took it up as a mining location; I did not take up any other mining location in Rock Creek; I found these colors half a mile or three-quarters below this Teddy Fitch's place, down close to the Box Canon; found two or three or four colors; I
375 never followed it up; I saw enough to know that there was gold there; I found two or three or four colors in a pan, yes sir; ain't that enough? That is all I found or panned; I did more panning; I found more colors; I didn't count them any more; I did not leave them; I did

not take up any mining location there; I looked around over the country and it didn't suit me, then I left; I don't know as I found anything there that was worthy of my attention as a miner; I don't know as I would have located it if I had; I was liable to have left it behind; yes, sir; I got four dollars a day in a place and I needed the money worse than a mine. 376

Recess until 9 o'clock a. m., June 2, 1898.

Tucson, Ariz., June 22, 1898, 9 a. m.

All parties present; jury called and all present. 377

F. M. Abrams, called as a witness on behalf of the defense, was duly sworn and testified as follows:

My name is F. M. Abrams; I live in Bisbee, am engaged as a clerk for the Copper Queen Consolidated Mining Company; I have lived in Cochise county pretty much since '79; I know the Chiricahua Mountains; I have resided there, in the Chiricahua Mining District, up in Buckhorn Basin; there I was engaged in mining; I have mined all over Cochise county and a part of Graham and I believe a part of what is now Gila county; I was engaged in prospecting a part of the time, say from 1879 to 1887 pretty regularly; I did gold mining in Buckhorn Basin; I was engaged in mining there for six years. 378

Q. State whether you ever mined anywhere else in th Chiricahua Mountains? A. Yes, sir.

Objection; unless qustion is limited and qualified under the Court's ruling; overruled; exception.

A. I have mined in — Canon, Wood Canon and in Rock Creek Canon; I have mined in 1895 in Rock Creek Canon; quartz mining and prospecting in Rock Creek Canon; among other things, there, I did a little development work, about ten feet of a shaft; I made a location there I believe two locations; I mined near the first mill setting of Ross; 379

perhaps a quarter of a mile from it; the rock I mined in was of a decomposed character; porphyry and iron; * *
380 * * * * I made my location upon conditions that were known to me.

Q. What were those conditions?

Objection; question does not indicate what conditions are being spoken of; overruled; exception.

A. I know it to be a rotten decomposed quartz such as I have seen in other places and what had afterwards turned out to be a paying mine, the same conditions at the surface in Rock Creek Canon I have known to exist
381 at other places and I knew to turn out as paying propositions.

Motion to strike; denied; exception.

I did about ten feet of work at that place; I had it recorded; I did not continue to work below the ten feet; I didn't have the means for one thing; I did not observe any other mineral in that canon; I didn't examine closely; I paid more attention to that particular spot while I was in there; this was a quarter of a mile or less from the lower mill setting.

382 CROSS-EXAMINATION.

The location that I made with reference to the lower mill setting is right on the divide where the grade goes down into Rock Creek or the road goes down into Rock Creek; it is not on the first divide; no, I should say about a quarter of a mile from the ridge that comes up from Turkey Pen; north; in a northerly direction; there is not a dividing ridge where I did the development work, that divides Rock Creek from Turkey Pen; the highest point between
383 Rock Creek and Turkey Pen is south; the ridge is south of where I did the work; this is about a quarter of a mile from the lower mill setting in Rock Creek; in a southerly course; it is in a westerly course from the road; in fact it is right alongside of the road, right near to the road; west

of the road; it is not more than 100 yards from the road; feet I mean; the name of the location is the Alman; I located it in 1895; I did this work shortly after the location, about a week or so afterwards; I have done no further work since that time in 1895; I believe the claim has run out; it is subject to re-location; I have not done the assessment work and have not re-located this year; I have not re-located it since I located it; I did about six feet of work; a shaft and cut combined; right in the side of the hill and then sunk a shaft; worked on a rotten decomposed quartz and iron; I do not know that it is a fact that I have done no development work on that claim since 1895 for the reason that I don't consider it worth developing. I stopped; I was working for Abrams at that time; myself; previous to that I had been in the employ of the Copper Queen. I did not go into that country at the suggestion of the Copper Queen, I went at my own suggestion; no, I didn't sever my connection with the Copper Queen; it is a fact that I went into Rock Creek Canon in the employ of the Copper Queen, or to see whether I could not find something that would benefit them in this suit; I believe that is the best thing I found there; not in Rock Creek Canon but right near there though; it was right in where the timber was cut; it isn't a half a mile or a mile and a half away from where the timber was cut, there are stumps right around there any amount of them; I had samples of that mine; never had them assayed. I offered them for assay but they were not made public in court either before or after, though I asked for the results, and that was one thing that kept me from further development; well, I don't know really what the rock did go; I thought it was valuable or I would not have done the work; I didn't know what the assay value was; yes, have an interest in it; my location has run out; very true; it may have been relocated by this time; I have not been down there since; it is not in Morse Canon; it is right where I say it is, in Rock Creek.

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RE-DIRECT EXAMINATION.

388 About two miles and a half from this Alman mine I found other rock; in southerly direction; southeasterly I do not state that I located the Alma mine at the suggestion of the Copper Queen Company; at my own suggestion; the party that asked for the assay returns were Mr. Smith and Mr. Ellinwood, counsel for the government; in the last case, yes sir; the reply was something like this: "It might go something; we didn't have it assayed; something like that; "Fred it might go something"; that was it. I believe that was Mr. Ellinwood.

389

RE-CROSS EXAMINATION.

I was on the stand at the last trial of this case and presented samples to the Court; there were samples from the Alma and other; one was a sample from the Alma and the other from a place in Morse Canon; I don't remember about the mark of the sample from the Alma mine; it was a sample I had taken in the shaft as the work progressed. It was decomposed rock, very decomposed; I didn't present no 18 samples; I presented four; I
390 know that all the samples put in evidence were actually put before the jury; I know that this decomposed rock and the float were never assayed and my samples were not assayed and the decomposed rock was not assayed.

P. A. Boyer, called as a witness on behalf of the defense, testified as follows, after having been duly sworn:

My name is P. A. Boyer; I live at Dos Cabesas; I am engaged in different businesses; sometimes in mining and blacksmithing and that line; Dos Cabesas is in the Chiricahua Mountains; I know part of the Chiricahua Mountains pretty well; I have been over them considerable. I
391 have been over them since 1880; I have done some mining there and have a mine there now and am mining there now; I have mined there as recently as last December; the mine I mined in is gold, silver and copper; we got a

shaft sixty feet deep; I conducted my mining from the surface there; I was interested in another claim and have done a little work on it. * * * * * I know 392
where Rock Creek Canon is, I have not been in Rock Creek Canon but I have been on the divide between Rock Creek and Pine; that is the first house I got; I could see Ross' saw mill from where I was; there was timber cut right on the divide of the two canons, right on the top of the mountain; I was at that place I think in 1888 or 1889; I was prospecting at the time; I found quartz, some mineral bearing rock; it was white quartz and had copper stain and looked like silver in it; I have mined in quartz mines where there was silver in the quartz in those Chir- 393
icahua Mountains; the ledge was two or three feet wide, I should judge. I traced it north from there into Pine Canon; I did not trace it south at all; this outcrop was two or three hundred yards from the top of the divide, in Pine Canon; I found no other quartz in the immediate vicinity of Rock Creek Canon; I prospected no further, only from thence north to Pinery Canon.

Q. State whether you found any ledges north of Rock Creek in the immediate vicinity of Rock Creek Canon. 394

Objected to because he is asked to testify to a conclusion. (No ruling.)

A. In Pinery Canon there are a good many ledges; not just claims, but considered ledges.

Motion to strike. (No ruling.)

I found ledges in Pine Canon; the nearest to Rock Creek Canon that I found was two or three hundred yards from the divide between the two canons; that is the one 395
I have been talking about and others too; another one I found runs across Pine Canon Creek; the bottom; there is a big ledge which runs through the country and can be traced for two or three miles; can be traced across from

Pinery over to Rock Creek; to the divide, this ledge can be traced; * * * * * me and another man have
396 a claim on this ledge in Pinery Canon and we work it and do our work every year; it is a gold, silver and copper bearing rock; we have a sixty foot shaft down; it will go about 16 to 18 per cent in copper; about 8 or 10 dollars a ton in gold; it goes as high as 65 ounces in silver; we never shipped ore only for assaying; this mine is still being protected year to year; on the surface I found indications, lead; white quartz and lead; I found a streak of six inches of lead where I started to work; that lead has been continuously in the shaft; it has increased to 24 inches in
397 width; at first we didn't have no copper but the more work we done the more copper we found; the silver has increased a little, just about the same only the ledge has increased. The color of that ledge on top is white quartz; it is called now the Summit mine; it was first called the Occidental.

Q. Are there any other mines?

Objection; too general.

Col. Herring: Or mineral indications on that ledge?

398 Objection; it must be valuable mineral deposit.

Overruled; exception.

No other mines on this ledge that I know of; no other locations; there are other mineral indications on that ledge; mineral all through the country; the nearest mine to the Summit is the Dunn mine; it is about two miles from my mine.

George J. Roscruge, recalled for the defense, heretofore sworn, testified:

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The number near the Boyer mine is 14 or near 14; it is east of fourteen; it is in tp. 17 south, range 30 east; it is in the township north of the one in which the timber was cut; the township immediately north and adjoining.

CROSS-EXAMINATION.

Point 14 on the map is three and a half miles from 400
the north division of the ridge between Pine Creek and Rock Creek; it is across Pine Canon and a part of Pinery Canon; on the north side of Pinery Canon; the topographical mark on the north side of Pinery Creek is about half a mile north of the canon; near the top of the ridge.

RE-DIRECT EXAMINATION.

The position of the Dunn mine on this map is about 2 miles and 3-4 north; Dunn mine is six miles north of the north ridge of Rock Creek Canon. 401

P. A. Boyer, recalled for the defense, heretofore duly sworn, testified:

I have been at the Dunn mine; I was there last fall; I couldn't tell what month.

Q. When did you first know the Dunn mine?

Objection; it is incompetent and irrelevant.

Overruled; exception.

About 81 or 2. 402

Q. From 80 to 81 up to this time, will you state how familiar you have been with this mine?

Objection; immaterial and irrelevant; overruled; exception.

I have been there and have seen men working there and shipping ore from there at different times.

Q. I will ask you Mr. Boyer, whether from this Summit mine to the Dunn mine if any mineral indications exist in that part of the country going north from the 403
Summit mine to the Dunn mine?

Objection; irrelevant; overruled; exception.

(Question withdrawn.)

From this Summit ledge to the Dunn mine, there was several quartz ledges there, mineral bearing ledges and
404 silver at different places; it is true that there are quartz ledges all the way; some run east and west and some northerly and southerly directions.

Motion to strike out; no connection with the land cut over; overruled; exception.

ARGUMENTS.

Q. (By Col. Herring): Will you state how continuously and closely connected those ledges which you have
405 referred to exist upon the surface of the earth? A. Well, you find them every few hundred yards; and may be a thousand yards apart; there is a distinct ledge running north and south and on both sides; what we call stringers; small ledges that run east and west towards the main ledge; yes, between those two mines.

CROSS-EXAMINATION.

I located the Summit mine in 1890 or '91 or 92, one of them three years; it is on a ledge of gold, silver and
406 copper in it: quartz; white quartz; it ain't all plain white quartz but it's a white quartz ledge, as we call it; there is lead and copper in the rock; the quartz is white; there is silver color and the same color as lead and copper color; dark brown color indicates copper; grey color indicates copper too: we have a porphyry wall on one side and a kind of a lime granite on the other; lime and porphyry; the mine is located pretty nearly east and west; the ledge runs in an easterly and westerly direction; that is not the ledge I have been talking about that extends from the
407 Summit mine down to two or three hundreds yards of the ridge that is on the north side of Rock Creek; that ledge runs north and south, the mineral bearing ledge; that runs clear over from Pinery to near the summit of Rock Creek Canon; where I found it over the divide from

Rock Creek Canon it is white quartz; yes, mineral spots
in it; these spots are lead and copper; I never had it as-
sayed; I know there is silver in it; I never had it assayed; 408
supposed to be silver and lead mineral, these little spots;
or any other mineral; I found these mineral indications
at different places; at the place you are talking about that
is the only place where it cropped out; about two or three
feet of a ledge; I did not find any other place; there
was this white quartz right at that particular place; there
was about 9 feet 20 or 30 feet in length and about 2 feet
in width; that run in a northerly and southerly direction,
as I claim; I can't tell exactly; I have been in there off
and on for the last fifteen years; the last time I was at 409
this place we are talking about was about three years ago.
I did not locate it; I didn't take no samples; I didn't locate
it because I did not believe it would justify me in taking
it up; that is from what I saw of it; I haven't taken it up
since; I have never been back there in three or four years;
I can't tell you that this particular place we have been
talking about is a valuable mineral deposit. I never was
any farther south than the divide between Rock Creek and
Pine Canon; right on the divide; I don't know whether
this white quartz which we have been talking about goes
into Rock Creek Canon at all or not; it is on the north 410
side of Rock Creek Canon; I do not know whether this
same ledge is on the south side or not; I don't know any-
thing about that; it is about three miles from this point
of which we have been talking to the Summit mine; there
are about two canons between this point we have been
talking about and the Summit mine; you can go over one
divide; I found the same ledge that I found over the ridge
from Rock Creek in Pinery Canon and over the ridge I
found the same ledge in Pine Canon; I can't tell exactly
whether it is the same ledge; it comes up in places and 411
in other places it don't come up; I can't swear that that
continues up to my mine from just over the divide from
Rock Creek; it runs in the same direction; I can't say it

is the same ledge; my mine ain't located on that same ledge; I don't know of any location of mines between this
412 point near Rock Creek Canon and the Summit mine; I do not know that the ledge of which we have just been talking is in any way connected with the ledge on which the Summit mine is located. No, it ain't the same ledge; no part of my location covers any part of the ledge we were talking about over there at Rock Creek Canon; between my mine and that point there is a high ridge and two canons and I have never traced this ledge into my location. * * * * I do not know anything about Rock Creek Canon; I was never in Rock Creek Canon.

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RE-DIRECT EXAMINATION.

I have been on the summit between Rock Creek and Pine Canon; * * * I found this ledge that I have described as extending north from Rock Creek, in places then it disappeared as you have stated and I found it again and it seemed to be the same ledge and running in the same—southerly—direction; it was of the same general characteristics at the several places where it reappeared; where it disappeared it was covered with loose rock, all
414 kinds of rock, and loose dirt and covered with brush and trees; I am talking about the north and south ledge; this ledge of which I have last spoken is found in close to my mine, within about six or eight hundred yards; to the south of it; this ledge appears again, north of my mine at different places.

Motion to strike.

The Court: The motion will be allowed and the jury are instructed not to consider in the determination of this case any of the testimony of this witness relating to or
415 showing the mineral character of the Summit mine or location.

August Joerss, called as witness for the defense, duly sworn, testified:

My name is August Joerss and I live in Bisbee; I know the Chiricahua Mountains; * * I have mined in there for the last four or five years at Jhu's canon on the east side of the Chiricahua Mountains, towards the San Simon valley; I have mined in the Chiricahua Mountains at the place I have named. * * * * I have not mined at any other place; I have been all over that particular part of the Chiricahua Mountains; I went up from San Simon in wagon; I don't know how high up the mountain my mine is; I went there for the first time and a partner of mine died there in 1893. 416

George J. Roscruge, recalled, heretofore duly sowrn, testified: 517

The distance from the north rim of Rock Creek Canon to Jhu's Canon is four miles; tp. 17 S. R. 30 E. that is the township immediately north and adjoining the township in which the timber has been cut.

CROSS-EXAMINATION.

The four miles I speak of is measuring from the divide south of Jhu's Creek to the top of the divide north of Rock Creek Canon; Jhu's Canon is on the east side of and running northeast from the Chiricahua Mountains. 418

August Joerss, recalled, heretofore duly sworn, testified:

(Objections by prosecution sustained to his testimony.)

E. G. Boyer, called as a witness for the defense, duly sworn, testified:

My name is E. G. Boyer, I live at Wilgus in Cochise county; I know Rock Creek Canon in the Chiricahua Mountains; I live about two miles southerly from that canon; I have been mining; not in Rock Creek but in the immediate vicinity of it; about two and a half miles from Rock Creek; northeasterly, in Pinery Creek; I have a mine or location in Rock Creek or vicinity; it is known 419

as the Boyer ledge; it was located by me on the 12th of April, 1898, there is a ledge cropping out there of quartz,
420 heavily mineralized with iron pyrites on a porphyry contact; I should say it is about two and a half miles south of the middle Ross' mill setting; this ledge is visible for 500 or 600 feet, I should judge, in a northeasterly direction; that extends up in Ward Canon; not exactly in direction of Rock Creek Canon; Ward Canon does not lead into Rock Creek Canon; I don't know that it leads into any canon at all; I don't know it opens up any canon; it is a separate canon in the mountains; as you come north over the divide from Ward Canon the first canon you next
421 come to is Rock Creek Canon; the ledge I have spoken of runs in a northeasterly direction and it is uncovered for probably 500 or 600 feet; if you pursue that direction northeasterly, eventually it will come into Rock Creek Canon; the color of the lead I have spoken of is grey quartz, with iron stain; * * * * I have been in Rock Creek Canon; I have not prospected in Rock Creek Canon; I have found limestone in Rock Creek; probably one hundred yards from the first setting of Ross' saw mills; about 1 0 feet exposed. Found no other limestone in Rock
422 Creek Canon or vicinity; I never prospected for it in any of the canons adjoining Rock Creek. I did not find it elsewhere in Rock Creek.

Victor Artel, called as a witness for the defense, duly sworn, testified:

My name is Victor Artel, I live in Pinery Canon, Chiricahua Mountains, Cochise county, Arizona; I have mined for lead, silver and copper in Pinery Canon, up to the time I was called to Tucson, at this time; * *

Q. You may state whether there are any mineral ledges observable on the surface in the vicinity of your
423 mine in Pinery Canon.

Objection; incompetent and irrelevant; too remote from the land over which the timber was cut; overruled; exception.

A. There are; quartz ledges; there are indications of mineral in those ledges; * * * I prospected in Pine Canon in the year 1895; about four miles from the mouth 424
of Pine Canon, up at the fork of the canon; I prospected on the west side of the canon; it may be the south side; but it is on the right hand side as you go up the canon; it is on the side nearest to Rock Creek Canon; if I were to go up the mountain on that side and go south, I would come to Rock Creek; I just looked around for quartz and found some old workings while I was prospecting for quartz; those old workings are on the right hand side of the canon as you go up; about two or two miles and a half to the rim of the mountain between Pine and Rock 425
Creek; there is a shaft and indications of a tunnel, but the tunnel has washed down and the face of the tunnel has slid down; where I was, the shaft was filled up with water; I threw rocks into it and should judge it was 30 or 40 feet deep; I can't state exactly how long that tunnel was; there were indications of expensive work in the tunnel; there was considerable timber; part of it was washed away.

Q. Well, Mr. Artel, was that rock in place?

A. I thought so at the time. 426

Objection, to the thoughts of the witness; motion to strike out. Overruled; exception.

I did not prospect anywhere else particularly in Pine Canon; I prospected in Rock Creek Canon, for gold, silver or anything I could find; I did not find any gold in Rock Creek but I did in the immediate vicinity of Rock Creek, about a mile and half or two miles; I know Turkey Creek, the Turkey Creek that I refer to is a creek that runs down into the Sulphur Spring valley; I found this gold about 427
half a mile above Morse's mill setting; Morse's in Turkey Creek; it is Turkey Creek that runs up by Wilger's there; Turkey Creek continues on up to Morse's and then it becomes Turkey Pen after that; I found that gold about

two miles from Morse's place, I guess; above, on Turkey
Creek; the gold was quartz; the gold that I had was deter-
428 mined to go $2.00 by assay; * * * It was the assay
of Mr. Bain of Dos Cabesas; he is engaged in assaying;
the character of the rock I had assayed was quartz; it was
taken from a ledge; the ledge was about a foot and a half
or two feet and could be traced on the surface for several
hundred feet; it ran north and south, I think; I have not
been to the place since; it was pointing in the direction
of Rock Creek; I found limestone in Rock Creek Canon,
on the south side of the canon at the first mill setting;
that is the point at which the witness Boyer said he found
429 it; we were together at the time; Dr. Ricketts was also
present; yes sir, he was there and saw this limestone and
Joe Smith; I did not find limestone in Rock Creek; I
found limestone in Pine Canon; that is about three-quar-
ters of a mile from Rock Creek; on the south side of Pine
Canon, I couldn't state how far from the upper mill set-
ting, I was never up there; the mountains in the vicinity
of Rock Creek and adjoining are very rough; they are
steep and rocky; I know a part of the ground where the
timber was cut; it is very steep and rough; the mountains
430 in Rock Creek and vicinity were very difficult to prospect
in; we had to climb up the steep sides to prospect; when
a man climbs the mountains there, every hundred yards
or so, he has to stop and take breath.

CROSS-EXAMINATION.

I did not find the quartz in which I found the gold,
on Rock Creek Canon; I know where the first mill setting
is in Rock Creek; the point where I found the quartz was
south from that point; about a mile and a half; in Turkey
Creek Canon about half a mile above Morse's mill setting,
431 Morse's old mill setting is in Turkey Creek; there is a
Turkey Pen, it is north of Turkey Creek, and Turkey
Pen runs from the northeast in a southwesterly direction
into Turkey Creek; I found this quartz about 2 miles in a

southerly direction from the forks of Turkey Creek and Turkey Pen, up Turkey Creek; on an air line it is about a mile and a half from Ross' first mill setting; it was not 432
down in the creek where I found it; I came across the country and ran across the ledge there and I broke some rock; about maybe, 150 yards above the creek bed; to the north, on the north side of the creek; I couldn't tell exactly how much of this quartz there was; quite a bit; it was a ledge. I should judge about a hundred feet of it exposed; in length about one hundred feet, there were little breaks where it was covered up but you could see the quartz exposed; I didn't follow it I only broke off the piece from where I saw it exposed; I didn't examine it very 433
closely; the part that I struck first was just a little south of the center of the exposure; that was in the summer of 1895; I didn't see it extend any further towards Rock Creek than where I saw it; I didn't make any explanation; I don't know; this quartz lay towards Rock Creek Canon; I had no compass along and a man not very well acquainted with the Chiricahua Mountains, he cannot give the direction by the compass; I never did any development work on it; I have not been back there since; I was prospecting; I was looking for a second Pearce; it was during 434
the Pearce excitement and I was not satisfied to do any work on a 2 dollar assay, it was not of sufficient value to work on at the time; I was looking for something better; it was during the Pearce excitement; $2.00 gold ore would justify a man to do some work there; it would not pay me at that place; I was hunting and prospecting for something better; I was over part of the ground where the timber was cut on Rock Creek Canon; I was in Rock Creek Canon and passed out on the south side; I don't recollect how far from where the timber was cut, this ledge 435
was; the timber was cut clear to the summit of the divide between Rock Creek and Turkey Creek, the ledge is probably a half a mile down from the divide; it may have been a mile; this ledge didn't interest me after I had examined

it; I was not working for the Copper Queen when I was in there; I never worked for the Copper Queen and never
436 intend to.

Motion to strike out all of the testimony in relation to any mineral deposit or indications of mineral that this witness discovered either a half mile or a mile south from the farther point where the timber was cut; for the reason that he has shown no connection with that particular point on Rock Creek.

Denied; exception.

E. N. Burlingame, a witness produced by the plaintiff
437 by agreement between plaintiff and defendant, out of his regular order of examination, was duly sworn and testified as follows:

Mr. name is E. N. Burlingame, I am a chemist and assayer, I have been engaged in that business 35 to 40 years; I am a member of the firm of Burlingame & Co., of Denver, Colo. I received samples from the Geological Surveyor, he is down in my book as W. Lingren, I think; those samples were in boxes; inside of the box there were fruit jars; wide mouth bottles and each contained a sample
438 and was numbered: the bottles and jars were sealed; they came in those jars, as I explained, and over the top of each one was a little slip of paper sealed on the top; and on the other side was a string around the neck which was sealed in with a paper also, and then the number of each sample was on the jar. I had instructions to make the assays myself; I followed the instructions as carefully as possible; we took the samples out after undoing the strings and noted the numbers carefully; and then assayed them and sent a copy of the report to Mr. Lingren at Washing-
439 ton; I made assays of all the samples, yes sir; I have a record of those assays in my book; I have a certificate of those assays; these are the certificates; of the assays I made from the samples, yes; I think the certificates are the same as the record in my book.

(Marked for identification Plaintiff's Exhibit 1.)

I know that those assays are correct; I do; I had no knowledge of what those samples were or where they came from; except the letter of instructions; we supposed that they came from the southern country; that letter? here it is. The number on those jars I received, correspond with the numbers on these certificates. 440

CROSS-EXAMINATION.

There are thirty-five numerals on this certificate under the head of No.; that represents all of the samples assayed from Mr. Lingren at that time; they are assays of samples received from Mr. Lingren; I made no other assays that I know of, in relation to those ores; if I had made it I think I would know it. I have a firm assay office in Denver, Colo.; I do a large business there; I didn't make those assays personally but they were made under my supervision, all of them; the samples were in rather small pieces, if I remember right; we ground them up after receiving them for making what is called pulp or a fine powder of them. 441

RE-DIRECT EXAMINATION. 442

These assays were made as we usually make assays; we have various employees in the office; and one man does ones thing and one man another while I overlook the whole thing. We find that to be the most correct way and the one with the least errors; for instance, one man grinds the samples, another man weighs them in for the furnace, another man does the furnace work, another man parts and weighs and obtains the result of the bullion, while the clerk puts them down on the book and copies the certificate from the book; I had special supervision of these operations; I stood there and directed it; I was there all the time looking after it and while some omissions might have been made, I have no reason to suspect that they were 443

not always done as we always do them and as we usually do them.

444 RE-CROSS EXAMINATION.

I can't say that I performed a single operation that I have described, I don't do that work usually; I have men there who are employed to do that and they are under my supervision; these employees are in the dpartments devoted to these operations; I have a business office outside of this laboratory, but it is customary with me to go in and see that the samples are all right and go into the weighing room and see that they are weighed in correctly; as they
445 go into the furnace room, I go into that room and watch the furnace operations, and as they come into the front room where they are weighed, I see they are properly weighed and parted, this is usually done in the same room; the clerk has the front office; there was nothing done in this assay personally by myself; those things were entrusted to operatives and under my care; and when the result was finally announced by one who operated or obtained it, I signed my name to this certificate.

RE-DIRECT-EXAMINATION.

446

Some of the pulp was sent to Lingren in Washington and some is always kept in the office for reference for six months; they were sent by express; they were marked; there was a balance of remainder of each sample; that was marked with the number it had on it when received by me and was sent by Wells, Fargo & Co. to Mr. Lingren at Washington; these were the samples received by, a portion of each one of them.

E. J. Hands, called in behalf of defendant, duly
447 sworn, testified:

I have been on the stand; I have been engaged in mining until I was called on this case; in the Chiricahua Mountains; on the summit between White Tail and Pinery;

the last time I came there was about three months ago; I had done work there before but not continuously; I couldn't tell you exactly when I worked there before; six or seven years ago; I have three mines there; I couldn't say if my mine is in tp. 17 south, R. 30 E. or not without looking at the map; the mine is between a thousand and fifteen hundred feet nearly up east of this spring marked "Dunn Spring"; part of the mine is on one side of the summit and the mine I am working now is altogether on the west side of the summit of the mountain. 448

CROSS-EXAMINATION.

I do not know how far from Rock Creek Canon that is. 449

George J. Roscruge, recalled, heretofore duly sworn, testified:

Dunn Springs is a little over six miles from the northern side of Rock Creek Canon, in tp. 17 S. R. 30 E.

CROSS-EXAMINATION.

Near the northern part of the township; near the main range of the Chiricahua Mountains on the west slope; on the north side of no particular creek; it is up at the east end of Pinery Creek, that is one of its branches; that is, I should say the north end of one of the branches of Pinery Creek. 450

F. J. Hand, recalled, heretofore sworn, testified:

I have been engaged in prospecting in recent years; I could show you better by the map than I can describe the country I have been prospecting in; there is a ridge here and south of this ridge, this is the whole side of the country up to Ft. Bowie; the east side I am speaking of; the east side of the main ridge, a little to the south of Buckhorn Basin, on that side; not all to the south; I am down farther here; I mean the foothills on the west side; along between Pinery and Pine Canon; I have prospected along 451

the summit some but not down towards this place; in Pine Canon is one place and then I have been down to
452 where the mill setting, Rigg's mill setting was some years ago; Rock Creek Canon, nearly down to the last mill setting. * * * *

RE-DIRECT EXAMINATION.

* * * * * I know where Boyer's mine, the Summit mine is; I have been in Pine Creek and prospected a little there; my mine is in Pinery; I prospected a little in Rock Creek Canon, at the head of the creek nearly; there is quartz float there in several places; in another
453 place there is iron stained rock apparently in place; the quartz is simply float quartz; I didn't hunt the ledge up; I did not trace the iron indications; I found mineral ledges or indications of mineral on Pine Creek; they were at a general course with Rock Creek; there is one directly north of where Rigg's saw mill was setting at that time; the other place was down the canon; I couldn't tell, three-quarters or a mile down, on the south side of the canon; that is the side next to Rock Creek; they both run in the same direction; northerly and southerly; if they extended
454 southerly, they would be extending towards Rock Creek Canon; there were a number of workings there on Pine Creek, of different kinds; there were mineral indications at these points of workings; quartz carrying iron and a little copper stain.

CROSS-EXAMINATION.

I couldn't exactly tell you when I took that prospecting trip into Rock Creek Canon; it was several years ago; I can only tell you within a few years; I have told you it
455 was three or four or five years ago; that is certainly close enough when I cannot tell you the exact year; I didn't say I went on a prospecting trip into Rock Creek Canon; no, sir; I didn't say I did; I was examining and prospecting

but I didn't say so; I was prospecting when I was in there; I was partially on a prospecting tour when I was in there; hunting and prospecting; I didn't claim anything in Rock 456
Creek; I am sure of that; I couldn't state whether I know where the forks of Rock Creek is; as far as I was in the canon was where Ross' mill setting is the last time; I don't know if that is the forks of the creek; there may be other forks; I don't know what is the forks of Rock Creek; I was at the lowest mill setting of Ross; I don't know how many mill settings there were; I was there afterwards; the mills had been there, I suppose; the mill was at the place I speak of at that time; I can't locate the mill any closer to the forks; part of the mill was there; it was not being 457
operated; timber had been cut around the mill at that time; the place where I found the quartz was right over the summit, on the Rock Creek side of the summit; probably 2 or 300 yards. The main summit of the mountains; yes, of the Chiricahua Mountains; it was west of the backbone of the Chiricahua Mountains, probably two or three hundred yards; I was just giving ordinary attention to the distance, for a prospector; I remember distinctly that I saw it at that point; I know it is in Rock Creek Canon; I couldn't see how much I saw of this quartz; I can state 458
there was float there; I didn't count the places I saw float; I saw more than one place; I didn't notice how much of the ground this first place of float covered; I can give you no information on that subject; I can't state that I found any rock that was not float at this point; I found something with an iron stain in it; that was not float; it was just on the summit; just on the wash that would go into Rock Creek; that is not the quartz float I am speaking about; I found the quartz float in another mountain further north; it is impossible for any person to answer how far from 459
this place where I found the rock that was iron stained up on the backbone of the mountain.

This float with regard to the backbone of the Chirica-

hua Mountains where I found the iron stain rock, was
460 farther north; it was some distance from the summit on Rock Creek Canon; I have said it was about two or three hundred yards down from the summit; I didn't look for any lode; I was not looking for ledge that day right there; it was in the winter time and it was very stormy and those storms are pretty severe and it cut me up so that I was in a hurry to get to Ross's to stay all night; I paid some attention to this float; I didn't say I found ledges, I made no search for the ledge; this float rock that I found was white quartz; I found iron in the float; I consider it valuable, yes; I profess to be a miner and prospector; I didn't
461 say that brown color on stone or quartz indicates iron; I didn't say this brown stuff was in this quartz; it is on the summit: there are two different places and you are getting one place mixed up; I am trying to answer your question; the float rock, I have told you two or three different times is white quartz; no brown stain on it; there was iron in that white quartz; it wasn't indicated; there wasn't anything to indicate it; I could tell it was iron by breaking it; I have already stated that there was no indication of iron in the quartz; there was no other indication
462 of valuable mineral in that quartz, that I saw; iron indicates to a prospector that there might be other metals there; gold and silver; if anything else, depends upon the judgment of the prospector; the iron was there itself; the spots were pretty small; probably as big as an ordinary pin head; that was all that was in that rock; the color of these spots was a whitish, yellowlike color; that is all I know about that individual spot of Rock Creek; going away from these two places we have been talking about, I didn't find any other place in Rock Creek Canon where there were mineral, valuable, deposits or indications thereof; I
463 didn't say there was any gold or silver; I don't know anything about its containing gold or silver; that was four or five years ago; I have never been back there since; I have never done any work there; I cannot tell how old the work-

ings are in Pine Canon, they must be a number of years; I was prospecting a part of the time when I was in there; I was prospecting and looking for those old workings 464
when I found them I did no development in Pine Canon anywhere; I have not been back there since; I was not in there all the summer of '94 or '95; this was a little over a year ago.

E. N. Burlingame, recalled for further cross-examination, heretofore sworn, testified as follows:

I could not be positive if I personally put up the pulp which I sent to Lingren; it was some time ago and I could not tell you; sometimes I put those up and sometimes my 465
clerks put them up; I couldn't say for certain that the pulp I sent to Washington is a part of the pulp from those samples; because I am not positive that I put them or that my clerk put them up.

RE-DIRECT EXAMINATION.

It was pulp; some ground samples; we weigh out what is necessary for our assays and the balance is called pulp and that is put away for reference and sometimes for another assay; I think Dr. Lingren requested it; I don't re- 466
member positively about that; we generally return our samples to the party who sends them, if requested; (Last answer stricken out); I don't believe I brought his letter with me; I believe we received and answered a letter from him; I can't tell from the one I have here whethr or not that was a part of the instructions of Dr. Lingren; I think in his letter he requested me to keep a portion of the pulp; I have that letter; got it from the mill; in the regular course of business; I don't know anything about that signature, more than the correspondence I have had with the party. 467

(Reporter marked the letter for identification "X")

Frank Williams, called as a witness on behalf of the defense, duly sworn, testified as follows:

I live in Pine Canon, Chiricahua Mountains, Cochise county; I know a certain portion of Rock Creek Canon;
468 from the trail that goes from Pine Canon over through Rock Creek Canon, over the divide to Turkey Creek and on down through to the end of the valley, to the end, clear down to the mouth of the canon as it goes into Sulphur Spring valley; I have prospected over the upper part of that country from the south slope of Rock Creek Canon in a northerly direction over to Pine Canon or Pinery Canon clear over to a prospect there which I believe is located as the Summit mine; in a northerly and an easterly direction from which I have located I have prospected into
469 the same to a place called Bearfoot Park; in a westerly direction. I have prospected through the foot hills which lead from which I am located, in Pine Canon, in a westerly direction to the foot hills as far as they extend—in a westerly direction; I have done work upon my prospect in Pine Canon; * * I believe I know where the upper Ross mill setting is in Rock Creek Canon; yes, the upper one of the three; I have prospected the canon in that vicinity; I prospected that canon nothing more than for placer diggings; I found gold in the canon about a hun-
470 dred yards below the upper mill setting; I prospected where the second mill setting is; I found placer diggings in the creek bottom; that was all; I found a ledge in the Rock Creek Canon; as to what mill setting it was, that is beyond my judgment; the ledge that I found runs over the divide between Rock Creek Canon and Pine Canon; I found a ledge there, a quartz ledge; I prospected that ledge through and located a claim in Pine Canon; that is the claim I said I did the work on; my claim is about a mile from the divide on the north side of Rock Creek; * * * * * prior to my location, I found float on that ledge
471 and had that float assayed at my own expense; I have some of that float here; I had it assayed by Shelts & Low of Denver, Colorado, and they returned me a certificate which I have not now; sent them copper float; have done

work on that claim and gone to an expenditure of about $200.00. I found quartz at the surface, with a copper stain; a ledge, a quartz ledge, with copper stain; I have 472
three shafts, two cross-cuts and four or five pot holes; deepest shaft is 6 to 10 feet; I have been at the bottom of that shaft: at the bottom of the shaft the conditions have changed to indications favorable; * * * on shaft No. 1, I had a quartz ledge there which was a white quartz ledge, and being very plain as I started to work on it; sinking down about two feet, or 2½ perhaps, I found mineral stains which were copper; and this stain seems to be getting somewhat better as I go down. On Shaft No. 2 I started with a quartz called iron stains which were rather 473
light but after going down about three feet I found them darkened, much more than when I started in. I have found other changes, a sort of talc or a sort of ledge matter which has gold in it, more or less; that is of my own knowledge; I tested that talc to a certain extent; I have burned this talc or ledge matter in a crucible and have took the contents and ground it up and horned it, and have got several colors out of a small portion of rock or out of this talc, of gold; I have been a miner and prospector before I came to Arizona; I mined and prospected 474
in the northern part of the State of Minnesota, Michigan and Montana; I have examined the country north of my mine in relation to the continuing of this ledge I speak of; it does continue beyond my mine northerly; I have traced it for quite a long ways but as to distance, I cannot say; I have traced it to a point called the Summit mine; it does disappear at intervals to a considerable extent.

Objection; the Summit mine has been stricken out; statement about or in relation to the Summit mine is incompetent, irrelevant and immaterial; overruled; ex- 475
ception.

As this ledge was traced up through this locality by me, it being a broken country, it disappears in localities;

perhaps a hundred and perhaps two hundred yards and appears and drops out again; you will find more or less
476 mineral stains between these croppings where they are broken out, on the cloat, which runs in a northerly and northeasterly direction from my claim or from where I first traced it, from Rock Creek or the divide of Rock Creek, or rather between Rock Creek and Pinery—Pine Creek —and it comes out of the ground on different places, perhaps one to two hundred yards, and perhaps in some places 5 or 400 yards; slides from rock and also dirt cover it in places where it disappears; sometimes trees and sometimes rocks; the characteristics of this ledge where I found
477 it are the same as those at my place; my claim is located as the Pure Stuff mine; I have not had that claim recorded; I am still in possession of that claim; I examined workings in Pine Creek, near Rock Creek, near the divide; the workings were four or five shafts and a tunnel; the characteristics of those rocks, to the best of my knowledge, which I have tested them to the best of my ability, was copper and silver and also iron; it was a ledge; about four or five hundred yards exposed in places; white quartz with copper stain and it had some decomposed rock mixed in; that
478 ledge extended in the direction of Rock Creek Canon; these workings were perhaps a quarter of a mile from the ridge, from Pine Creek, yes sir; I know where the old Riggs mill setting is; I should judge these workings were in a northwesterly direction from there; I examined the location and land in Rock Creek pretty thoroughly; that is prospecting through that country; I know where the timber was cut; I saw where the timber was cut; I have prospected there more or less; * * * I have the float.

479 CROSS-EXAMINATION.

I have lived in Arizona since last January; I came to Tucson, Arizona, first; I only stayed there a few days; I then went to Willcox, I did no prospecting or mining at

Willcox; I went to the Chiricahua Mountains from Willcox; that was about the 17th or 18th day of January, 1897, a year ago last January; yes, sir; I went to Rock Creek 480
at that time; direct from Willcox, yes sir; there were two or three people with me; B. Riggs, Harry Matlock, Lee Matlock and a gentleman that drove out there by the name of Pointer; I did not know them before this time; I met them in Willcox; I have remained in Pine Canon ever since; until I was called to Tucson, with the exception of a few days going to town and getting grub; I made the location of the Pure Stuff mine on or about the 17th day of February, 1898, and I did the work that I have spoken about afterwards; I did not work in Rock Creek Canon 481
except to test for gold, looking for placer diggings; I did not sink any holes or shafts; there was work at this Pure Stuff location before I went there; I prospected that ground and country for 10 or 12 months; around that claim and vicinity; perhaps eight miles or six; easterly, north, westerly and southerly; that was what I was doing from January, 1897, until February, 1898, principally; except when I came to town, I was in there all of that time; I came from the Pure Stuff location to Tucson; I began work on shaft No. 1 shortly after I made the loca- 482
tion; no one helped me at the commencement; on shaft No. 1 I commenced digging places; and sinking; I sank perhaps from six to ten feet; the rock that I found there was a white quartz with copper stain; the copper stain was sort of greenish; that is a copper stain to a certain extent; I say that that stain is a copper stain; I swear it positively; that green stain that I found on the white quartz is an evidence of valuable mineral deposit; it wasn't any iron stain; I am sure of that ; up to the time that I made this Pure Stuff location I had other work that I did, sharpening 483
tools, blasting, blasting roads and the like of that; on the road that runs into the Pure Stuff mine; I was cooking at the mill there for perhaps a month or something like that; that was when I first came into the country; along

about the 18th, 19th or 20th of January; I didn't find that copper stain at shaft No. 2; the green copper stain
484 was on the surface ground at shaft No. 3; it was a copper stain; the green stain that I saw there was the very best indication of valuable mineral deposits in Rock Creek; that stain in itself indicated valuable mineral deposits; not considering it in connection with anything that I found; it indicated copper; I found copper in that rock myself; * * * * * if also indicated gold; the balance that I done there has been cross cutting on the bed rock, which was covered up by dirt to find the solid formation which this mineral deposit was; I put in several
485 cross cuts; open cuts; three of them I have cross-cutted in three different places, perhaps four feet deep; I have three cross cuts and perhaps more if the Court could see the holes around there; I am a miner and I know what cross cut is; I have no other development work except several holes 2 to 4 feet deep; as to the quantity of the ore I have taken, I cannot state; I call pay ore that which will stand to be milled near the mine; I wouldn't testify how much pay ore I got out of that mine; I have taken out a big quantity, but I could not state how many tons; I have
486 not shipped any pay ore; I did not locate or record the notice of location because it is not yet time and I haven't done enough development work on it to be worth while recording it; the depth of the shafts run from 4 to 6 feet each; there is at least 12 feet of shaft work on that mine and perhaps more; I never measured the work in open cuts in feet; I believe I have done enough work and I could have recorded it if I chose; I didn't have it recorded because my pocket was not flush enough, I did not have a dollar and a half to record it; that was pretty short.

487 By Col. Herring: Witness: I believe that the work I have done and what I have spent in locating that mine has been perhaps over $200.00 worth of work.

Mr. Morrison:

Witness: I was subpoenaed as a witness at this location, on about the 21st or 22nd of May; when I was subpoenaed at the Pure Stuff mine the officer gave me $25.00 488
to come to Tucson on the 25th of May; I have talked nothing about this testimony before I came to town; I beg pardon, I believe Col. Herrinton was out there and asked me if I was the owner of that porperty; I told him it did and he took my name; that was all; this ledge breaks out in a direction from where I am located, towards Rock Creek; and it also breaks out on the other side of the divide in Rock Creek; I could not say which one of the mill settings this ledge runs northerly from; I couldn't testify as to the forks of Rock Creek; I have prospected in 489
Rock Creek Canon; I know there is a mill setting, I have been there several times; with reference to the mill setting at the forks, there is a trail that runs from Rock Creek to Pine Canon and this ledge is on that trail; perhaps part of the time to the right and part of the time to the left, but principally to the left of that trail; the Pure Stuff claim is about a mile from the mill setting at the forks of the Rock Creek; I found the same quartz in Rock Creek Canon as that we have been talking about; was not float; it was just on the sum- 490
that is quartz that looked like it; it resembled it very much; the quartz that I found in Rock Creek is a white quartz with iron stains; iron stain is a sort of reddish stain and by using a magnifying glass you can see a stain which resembles a copper stain, in Rock Creek Canon; I wouldn't state that it was the same copper stain which I found on my claim; I never tested it to that extent; I know from my experience as a miner that a very small particle of copper stain will cover a great quantity of rock; I couldn't say if that is the case with the white quartz of which I am speaking; the percentage of copper which 491
it would take to color this white quartz very perceptibly depends upon the place, as to being in sun or in rains or under ground; I couldn't say if a very small percentage

of copper would make the stains perceptible in the white
492 quartz I found on the Pure Stuff location or on the divide
or across the divide from Rock Creek; I found colors on
Rock Creek Canon; between the upper mill setting and
the lower mill setting in different places; I dug down in
the bottom of the creek and scraped off from the bed rock
dirt and horned and panned and in consequence, I re-
ceived the colors of gold; by colors of gold, I mean colors
that you can see after separated from the dirt, with the
naked eye, of gold; these colors would be rather small
to state to this Court; they were colors of gold and could
be identified with the naked eye; some of them were as
493 large as a pin head; probably out of one pan I got several
colors; I never counted the colors; I never counted the
pans; I could not give you any idea of the number of pans
or colors; I did not do all my panning in one place; in dif-
ferent places; I simply threw the colors back; it might
have been worth saving; I didn't consider those colors,
the amount of panning one pan at a time, of sufficient
value to retain them; I came there in that canon where
I worked for money; for the purpose of getting a grub
stake and prospecting; I got $25.00 as a witness from
the person who served me; I could not say that he was a
494 Deputy U. S. Marshal; he told me that this $25.00 was
for my witness fee and mileage; witness fee for one day;
yes, my mileage from that place; I am about 60 miles
from Willcox; from there I must travel by horseback or
railroad to testify; I did not receive that money for any
other purpose than the mere fee and mileage of a witness;
I have worked there since you was out at my camp and
saw me; I have worked in my mine since May 13th last.

August Barron, called as witness for the defense; duly
495 sworn, testified as follows:

My name is August Barron; I live in Tombstone, Co-
chise county; I have lived there since 1878; I have been
engaged in mining there; I have occupied the position of

foreman and superintendent of mines; I was superintendent for the Stonewall Co. and then of the Independence and then was foreman of the T. M. & M. Co.'s for several 496
years; for seven years; we did extensive mining then under my foremanship; I had in my charge as foreman sometimes from 150 to 190 men; I have mined in Mexico; I have also mined in California; I know the Chiricahua Mountains; I know Rock Creek; I was there in 1878; I didn't know what they called the creek then but I went there afterwards, in 1883, and found they called it Rock Creek; it was the same place I had been previously; in '79 I was there and I had a partner by the name of John Ridner; I was prospecting at that time; we camped there 497
a week; we were prospecting over that country about two weeks; yes I have been up to the summit; in Rock Creek I dug one hole about six foot in the gravel and I got a few colors; and I washed some other dirt and got a few colors; gold, you could see there was gold there; there was gold in Rock Creek, yes, sir; it was pretty close to the mill setting where I placered; in Rock Creek, I saw some iron boulders, some boulders with iron on them, and I went to the summit and it took me the whole day; I 498
climbed up on the left hand side and I found considerable white quartz, honeycombed quartz with iron pyrites through it; I went clear to the summit and came back down that way and it took me the whole day to make that trip; when I got on top, I went to the left and coming back, I found some lead ore; * * * * * * *
I think there is just as good a chance there to prospect as in most of the mountains in Arizona; there is lots of small quartz ledges and a lot of iron stains there and 499
porphyry and limestone and quartzite; I have stated what a person might do there and the reasons you found these conditions there.

CROSS-EXAMINATION.

500 I went into that canon in 1873, in September, I was prospecting; I found as much there as you would in other places; I found quartz and a few colors of gold; I dug holes in a good many holes there; I think it was below the mill; there was no mill there; no one lived there; I think it was right at the mouth of the canon and I remember that I got the best prospects on that bar; I didn't count the colors; it was not many; it may have been eight; I don't know how much they were worth in dollars and cents; I couldn't tell you exactly how much
501 it was worth; I couldn't go and make wages on it; if it was worth a cent, I would have worked it; there was lots of water there; it was not worth a cent; it was not worth five cents; it wasn't enough to work it but it was enough to say that there was gold there; it might encourage a miner to work more and find some; that is all the mineral I found in the canon; if a person had nothing else to do, he might just as well sink down on those quartz streaks on the mountain there and he might find a mine up there on the hill.

502 Q. As an expert and a man of a good deal of knowledge of mines, would you advise a man who has only his hands to make a living with and who had to pay for his grub and expenses to work a barren mine or a barren ledge.

A. I say a man has got to use his own judgment about that; I did it lots of times; I have sunk any amount of holes just where there was a color in; * * * it is the same on those ledges; a man may go and sink on
503 one of those ledges and find porphyry and quartz and find gold there and the iron stain and that is indication of mineral; I speak of the ledges at or near the forks of the creek; there is porphyry there and a man may come there and sink holes 10 or 12 feet deep and find gold

and may find a mine; there are indications there; * *
I would pay out money in prospecting where the surface
is barren and not a particle of mineral in it, when I would
think I would find something; as I told you before. there
is good indication and I have seen lots of holes 80 to
100 feet deep in that kind of ground and I have sunk
lots of holes in that kind of rock; as to whether I might
sink to 100 feet on Rock Creek on these indications and
get nothing, depends on circumstances I might be in; I
might think I would and might not find anything; but
there are good indications; no man can tell if you would
find anything or not; it would depend on the mine if I
would get anything or not; you may get a big mine there
and you may not; you may sink 200 feet and get a big
mine; I went back there in 1882 or 1883; I never made
any location there; at that time, I did not think enough
of it to put my own money in and sink a shaft there;
not at that time; I testified on the former trial; I testified:
"I dug different holes to find placer mines; I found a few
colors but I didn't find enough to go to work with."

Recess until 9 o'clock a. m. May 23.

Tucson, Ariz., June 2nd, A. D. 1898.

Court met at 9 A. M.

All parties present. Jury called. All answered names.

The Court: You may proceed.

Dr. Louis D. Ricketts, called to sustain the issues on part of the defense, and being first duly sworn, testified as follows:

By Col. Herring:

I am a mining engineer. I am a graduate of Princeton college, class of '81. I spent two years in post grad-

uate study after my graduation for the degree of Doctor of Science, which I received.

508 I first came west of the Rocky Mountains in '83. In '83 I came out, having accepted the position of surveyor for a prominent mining company at Leadville, and since that time I have been practicing my profession as a mining engineer, and have practiced constantly since then as a mining engineer, and a part of the time I have occupied the position as Territorial Geologist of Wyoming; afterwards, State Geologist. I was Geologist of the Territory before it became a state. I was re-appointed as
509 State Geologist of Wyoming.

There is mineral land in Wyoming for precious metals although there is gold, and other mineral and coal.

I will state that my chief experience in mining has been in the southwest and in Colorado; for at the time I was Geologist of Wyoming, I was consulting engineer and practiced outside of Wyoming, and then I was Geologist of Wyoming from the spring of '87 until the fall of '90.

510 I have had experience as a mining engineer in all the Rocky Mountain states. I have been from Montana to down in Sonora; all along the Rocky Mountains. I have had experience myself as a mining engineer in Sonora, Mexico. Also in Cochise county. I have been all over Arizona.

I am working as consulting engineer for a number of mining companies; the different ones being the Copper Queen and the Montezuma Copper Company and the De-
511 troit Mining Company, the United Globe mines, and the Commercial Mining Company. The Detroit Mining Company is engaged in mining in the vicinity of Clifton, Arizona, at Morenci. The United Globe Company is engaged at Globe in Gila county, Arizona.

I am quite familiar with the country in those parts. They are engaged in copper. Is a mining corporation in the vicinity of Prescott. It is not working extensively 512
at the present time. I know the Chiricahua Mountains in Cochise county. Rock Creek is to the westerly. It heads at the main backbone of the Chiricahua Mountains in the vicinity of Heliograph and Fly's Peak, and it extends from that backbone in a westerly direction, a width of one to two miles; that is the drain by the creek to the Sulphur Spring valley. It drains the ravines and hillside portions of the Chiricahua Mountains. The rocks in Rock Creek and in the immediate vicinity are igneous or eruptive rocks in character. They are of several well 513
recognized characters, and occur in large masses, and in addition to these eruptive rocks, there are defined and distinct areas of stratified rocks that are not igneous and they are prominent occurrences in Rock Creek and vicinity. As you depart from Rock Creek the eruptive rocks seem to have their maximum size in the vicinity of Rock Creek, having formed an exterior in appearance as if there had been a great ruin; so that as you depart from Rock Creek as a center, the igneous rocks, while still very important, become less abundant and the stratified rocks 514
become more abundant. There is simply that difference, that the stratified rocks become more abundant and the igneous rocks less abundant, but outside of that, the essential features of the structure are the same as they are in the vicinity of Rock Creek. To the north, as you go north, the eruptive rocks become less abundant, and chiefly limestones appear, that are of the same character and same formation of the limestone showing on Rock Creek, while to the east, the shale and limestones become less abundant, and rather connect with the dikes of overflow of eruptive rock that are exactly the same nature 515
as the rocks of Rock Creek. I want to emphasize that fact, that the difference between Rock Creek and the country in that vicinity is simply one of proportion and

not of kind. The rocks are the same, but in one case there is more eruptive rock and less limestone, that is, in
516 Rock Creek, and as you get away from that to the north and east, there is less eruptive rocks and sedimentary rocks, but otherwise, the formation is the same. The stratified rocks we find in Rock Creek are limestone and shale. The limestone is subcarbonates of limestone, which is the only limestone that I have recognized in the Chiricahua Mountains. At the same time I recognized that as a proper method in an area that is cut by eruptive rocks, and any formal structure is apt to be destroyed. I recognized it by its occurrence and by its position; its structure.
517 And I have no hesitancy in saying, that to the best of my knowledge and belief, all of the massive limestone of that country belongs to one and the same formation.

I have carefully examined the ground drained by Rock Creek and the immediate adjacent territory, or the territory in that immediate vicinity. I have examined it mineralogically and geologically. Taking up the igneous rock of Rock Creek, I will say that the igneous rocks between the lower and upper mill settings on Rock Creek, that are low down near the gulch, are more crys-
518 talline, and where they are eruptive rocks they are granitic in character, while up higher, they are more in the nature of porphyries and rocks of that kind, especially rhyolite, and both the lower and upper of these gangues of rocks as well, are still cut by dikes of porphyry and eruptive rock. On the Sulphur Spring valley side of the mountains in the immediate vicinity of Rock Creek, the rhyolite seemed to have a dip to the west; that is, up toward the upper mill setting, the point marked "Upper Mill Setting" on the map, and you find this rhyolite flows up, while on the mountains and as you go west they get still
519 lower until they finally dip beneath the gravels and sands of Sulphur Spring valley, and disappear with a general westerly dip; and they reappear on the opposite side of the valley, exactly the same kind of rocks that apparently

have been dipping, although the dip is not altogether that way; it is broken; but the general tendency on one side of the valley is to dip to the easterly direction, and 520
on the Rock Creek side in a westerly direction.

The rhyolites on the Chiricahua side have a general tendency to dip to the west, and on the opposite side of the valley, the rhyolites have a general tendency to dip to the east. The rhyolites as the claim appears run from the point of the Swisshelms.

Now, about as nearly as I can judge, a half a mile north of the point on the map on Turkey Creek marked "Smith Ranch", there is a little gap that leads through 521
the rhyolites and into Rock Creek Canon some distance below the point that Prof. Blake described as being the locality of limestone. Within 200 yards or less, of that divide, there is a blow-out of quartz that is from 20 to 50 feet wide. There is a whole lot of white quartz that has not got the mineral stains.

This quartz is ledge matter that is commonly associated throughout the southwest, with mineral deposits, and it is a part of them. Such a surface indication as I have just referred to of this point, would indicate that 522
there was ore in the vicinity, most assuredly. The point, as near as I can judge, is a half a mile north of Smith's Ranch. It would be right in the foothills here where the gap runs through to Rock Creek. That would be—from the lowest mill setting it would be five and three-quarters miles.

Mr. Bennett: I move to strike that out. It is 5 miles away from the land in controversy.

A. It leads into Rock Canon. It is probably 523
100 or 150 yards from the drainage of Rock Creek. The drainage flowing east, would finally get either into Rock Creek or Turkey Creek, which unite out in the Sulphur Spring valley.

The Court: Objection overruled.

524 Witness (resuming): Coming up Rock Creek, from a quarter to three-quarters of a mile in a southwest by west direction, there is a ridge that divides Turkey Creek Canon from Rock Creek Canon, and this is a little ridge and there is an old road into Rock Creek. And there is rock there, and a part of the rock is very soft and very much decomposed, and a part of it stands up, as ribs; and the rock is granitic and igneous rock, and it contains numerous streaks of white quartz, and also a great many streaks of ferruginous material, indicating decomposition of iron pyrites; iron rust; oxide of iron, and quartz, and one thing
525 and other. On the Turkey Pen side, about 100 yards—— on the Turkey Pen side but almost on the divide, I have said 100 yards; I mean 100 feet; 100 feet from the divide, you could walk down all the way and walk into Rock Creek. And there is a vein of quartz there, that is yellow in color, and is full of iron pyrites, which are very distinct, and that is a mineral bearing ledge. I cannot tell you where this would be in numbers; that has no number on the map, because I saw this point long after Mr. Roscruge had made his survey, and he could not
526 accurately locate that point, because he was not on the ground to see it. The point is probably three-quarters of a mile, or perhaps a little more down on this ridge that extends between Rock Creek and Turkey Pen, just to the west of the wagon road on a ridge, and would be about where my pencil now rests on the map, southwest of figure 7 half a mile. (Witness makes a mark). Resuming, witness says: Now from that point to the point marked No. 7 on the map and described by Prof. Blake, the rock is soft and decomposed and full of streaks or ferruginous material, and highly mineralized ground, so much so that
527 the decomposition of this pyrites has softened up the rock and made it into soft rock that you can dig. When they graded there, the dug the rock in place, out with a pick, it was so soft, and they dug a way for this road that is

marked on the map, and subsequent to this, took out a great number of pounds of this ferruginous material, and quartz and clay and gouge, and one thing and other. And 528
in the cut at the workings that were there, there was a shaft there that has caved down, and it is pretty nearly full. But two years ago, the shaft and the cut together were some 10 or 12 feet deep, I should judge. That is at 7. Now continuing up Rock Creek to a point near the second mill setting and just above it, I think at the point marked 10, there is an immense—not an immense, I will take that back, because it is not—there is a great deal of quartz float. It is white quartz float in pieces from the size of your fist up to about 300 pounds in weight, and 529
you can follow it up on the hill for about half a mile above the creek, and there the quartz float seems to stop. And there are large pieces of quartz in the slide, that appear to be in place. There has been no work done on it, I wouldn't say positively, but I am under the impression that there is quartz in place there; but it might possibly be float. Continuing over through in a southerly direction up the side of Rock Creek, you pass out of the granitic rocks and come into rhyolites, and when you get up five or six hundred feet above the bed of the gulch, the 530
rhyolites stop and shale comes in. Shale shows in places, but chiefly you determine it by the soil, and you don't see it very much in place, until you get almost on top of the ridge. The slide is very deep there and very little shows, but two big trees have blown down and the roots of them have up-turned the ground and made a pit, and in that pit there is a ledge of quartz of considerable size that is exposed. The quartz is whitish in color and is honey-combed, and there is a great deal of ferruginous material, and cavities containing oxide of iron; and along the seam between the quartz and the shale there 531
is a band that is partly quartz and partly shale and partly oxide of iron. Continuing on the ridge on the same course, on a line between this float down here and where

I found the vein where the pine tree is uprooted, there is a very rough country but a man can go over it on
532 foot, and you can spring around or pass around those places and follow this shale ridge down for a quarter of a mile down Turkey Pen, and then across the middle fork of Turkey Pen Creek and follow it up behind this peak; and here a quartz ledge similar in appearance but not quite so much oxide of iron as the occurrence last described, plainly outcrops along the gulch. Coming down Turkey Pen Creek, you come to the point marked on the map 5 and 6, described by Prof. Blake. No. 5 is a large white quartz ledge, outcropping boldly, and No. 6 appears
533 to be a spur from it, as far as I can make out. There is work done on this, and there appears to be recent work. There is a cut there and it shows a ledge of ferruginous material and quartz and gouge, that is well defined, and it has well defined walls, and it is about 2 feet wide. Now that is a distance of about 2 miles, from the starting point at 10. On this same general course, on Turkey Creek, below the point marked "Morse", there is an outcropping of a strong vein of quartz, similar in character to that, but not so much oxide of iron as shown on Rock Creek,
534 at about the point marked letter T of Turkey Creek just west of Morse's on the map. Now I don't know that these points are all on the same vein. If they are, the vein is hard and tight and not well mineralized in places and at such places it will outcrop and stick up out of the ground, and then again it is blind and covered up and would show at another point, and it may be or may not be, one and the same vein. If it is not, there are a number of outcrops prominently in line that extend across the country there for a distance of a mile. Outcrops of ledge matter. Now, the fact that there is a ledge there that
535 outcrops—that may be one ledge or a series of strong outcrops for that distance; but I think it must certainly be a continuous ledge, for there are considerable stretches of it where it can be identified as one ledge. It is one

of the strongest outcrops in that district, and it is natural to suppose—I was simply going to draw an inference as a mining engineer, from the occurrence of a strong ledge. 536

The conditions I found existing at the place I last testified to are, properly speaking, veins and deposits of ledge matter that in my opinion are associated with and are indications of valuable ore deposits.

Coming up Turkey Creek from Morse's past the old Morse setting, there is a district that shows a number of prominent quartz ledges, and they are similar in general character to the quartz ledges that I have already described, and the same statement I have made applies concerning them. I will mention a few of them, in particular the ledge indicated by figure No. 1. That is a very strong ledge of white quartz that when it is broken there are cavities in it with oxide of iron. It stands up boldly above the surface, and in places it disappears and drops out again. It is very wide in places; I would judge in places it is six feet, certain, and may be in places 15. About half a mile above the point marked "Morse's Mill Setting" on the north side of the wagon road and probably 150 or 200 yards from Turkey Creek, there is a quartz ledge where it is marked No. 3 on the map, which is from 1 to 2 feet wide, and it can be traced for some distance; and this quartz has a very considerable amount of fine iron pyrites through it. 537 538

I think point 3 indicates the point I am referring to, right here. (Indicating on map.)

From the lower mill setting it is about a little over two miles, maybe two and a quarter. It is about five-eighths of a mile from the Rock Creek drainage. Now in this country here (indicating on map), there seems to be a system of this ledge at point marked No. 2. There is a ledge there that is small, that is heavily iron-stained and shows pyrites, which I believe is located as a mining claim. Now above the upper setting on the same general belt as 539

these quartz ledges that I have just described, on the Rock Creek side, I found a small ledge of quartz, of rock
540 in place, some two years ago when I was up there. It is a very rough country. On the outside of the trail up Rock Creek, the country is very —— From just above the mill setting, there is a gulch leading down into Rock Creek there, and that is between Rock Creek and Pine Creek. Passing up this gulch along a slideway there is a trail, and you follow a trail up, and you come to an immense blow-out of red quartz. It is heavily mineral stained; it is a brilliant red in color, and it is full of cavities and holes with oxide of iron in them.

541 The outcrop that I have just spoken of, is a strong indication of valuable copper ores. That rich copper ore, as a rule, shows on the surface, because the sulphides decompose, and carbonate of calcium gets on the sulphides and precipitates copper, and you generally find under such conditions, rich copper ore on the surface. But on the contrary where you have copper deposits in eruptive rocks or in granitic rocks, there is nothing there on the surface to precipitate the copper, and the copper is almost always leached out and shows very little or not at all
542 on the surface.

Mr. Morrison: Objection. Denied by the Court.

I followed this out to the trail which crosses over a portion of this outcrop, and through the middle of one of these, and it extends some distance along the side of the gulch towards Pine Creek divide, and there it appears to be covered up, and it reappears at about the same level, the other side of Pine Creek divide, and from there may be traced practically continuously to the point
543 marked "Dunning Mill Site" on Pine Creek.

By the Court: The motion to strike out this part of the answer will be denied.

By Mr. Morrison: Exception.

Witness (resuming): At No. 8 there is a similar blow-out of the same kind of red porphyry, as there is on the Rock Creek side, and I regard the points as being 544
connected, and that they are a part of one and the same mineral deposit, mineral blow-out. There has been some work done at the blow-out at the point marked No. 8. I myself was at two of the workings, and of these workings one of them was a shaft and the other a cut with a shaft in the bottom of it. It had the same material, quartz and mineral piled up alongside on the dump, and it showed quartz and iron stained material. I want to be very emphatic in stating that at this point also, I consider the outcrop a strong mineral indication. I have 545
been in this mining district with Mr. Artel, in the vicinity of Rock Creek Canon. That place was not pointed out to me. The ledge was not pointed out to me by Mr. Artel. There was no ledge pointed out to me in Turkey Creek where Mr. Artel had taken a sample. I don't think any point in the vicinity of Turkey Creek or Rock Creek was shown me, where Mr. Artel had taken samples which he had assayed.

Col. Herring: Do you know of any place pointed out to you in Turkey Creek in the vicinity of Morse's mill 546
setting where Artel had taken a sample?

By Mr. Morrison: Objection.

Witness: I can state that I have heard the description of Mr. Artel of the locality. That locality as described by Mr. Artel corresponds to the point marked No. 3 on the map, which is about half a mile east of Morse's mill setting.

I have been engaged in the practical part of mining: I have prospected a little. I have been connected with 547
mines in the extraction of ore and have worked mines.

The limestone I found in Rock Creek is a pure and true limestone. There is an occurrence of limestone on

Rock Creek some three or four miles below the lower setting. I cannot on the map locate the exact spot, but
548 I should judge it was three and a half miles in a westerly direction from the lower setting, as described by Prof. Blake. It is quite a large outcrop, and it is broken up, the limestone, on the surface and reduced to a large extent of float, and there is then bands of limestone in places; the thickest band I saw was not over 2 feet wide. One hundred yards south of the lower mill setting, there is a well defined outcrop of limestone sticking out and protruding above. The widest point I saw exposed, I don't think was over 8 feet thick. About 15 feet above
549 that point, up the hill, there was limestone float; and I traced it continuously for probably 200 feet along the surface, and found it disappeared beneath the slide rock. I think there is quite a considerable amount of limestone there, and from the lay of it, it should appear on the opposite side of the canon. There is also limestone, a large outcrop, an assay of limestone, about half way between the Riggs' saw mill setting and the Ross setting, but on the Pine Creek side of the slope. It is probably a quarter of a mile from the edge of Rock Creek Canon
550 and I should judge three-quarters of a mile north of the point marked as the upper setting on Rock Creek; somewheres in here (indicating on map:) it may be a little farther, but I don't think so. This is a massive body and a prominence of massive limestone, probably 12 or 14 feet in diameter, and sticks up above the loose rock. I have tested these samples of limestone and I find the one between Pine Creek and Rock Creek on the Pine Creek side,, to be quite pure limestone; magnesia and limestone; it assays about 10 per cent. magnesia, 31 per cent. lime, about 8 2-4 per cent. silica and 12 per cent. of iron. The
551 limestone that is within 100 yards south of the lower setting is very pure. In Rock Creek. It is very pure limestone. It is 2 9-10 per cent. aluminum, and iron 2½ per cent., lime 51, point 59 per cent., and magnesia

a trace. It is pure massive limestone. And it is my opinion based upon my best knowledge and ability that it is a part of the same general limestone formation that 552
shows farther north in the region adjacent to Rock Creek.

I was in those mountains recently with Prof. Blake. At that time we examined certain points together.

I have been there twice since that.

By Col. Herring: At the time Prof. Blake was in there, was there any reason why you deferred visiting or didn't visit, all the points you have referred to, with the professor?

553

By Mr. Morrison: Objection. Overruled by the Court.

Witness: The places that I have described that I did not take Prof. Blake to, I didn't know about at the time he was out there; and also the country is very rough outside of the trail leading up Rock Creek. And there is a trail leading up Rock Creek and turning off Rock Creek into Pine and leading up to the very top of the divide; you may go most of the way horseback. There is also this trail that crosses over to Pine Creek. 554

But outside it was not practicable to take Prof. Blake because you have to go on foot, and I don't think he could stand it physically. Most of the localities I have described on Rock Creek in addition to those I showed Prof. Blake, I found afterwards by traveling on foot.

I examined the character of the country generally, in township 17 south, range 30 east, on the west side of the mountain. I made an examination of the country 555
in that township which is east of the backbone of the mountain.

By Mr. Morrison: Objection. Overruled by the Court.

By Col. Herring: What part of the country east of
556 the backbone of the mountain, of the Chiricahua Mountain, have you examined in township 17 south, range 30 east?

By Mr. Bennett: Objection. Overruled by the Court.

Witness: I have been generally through that portion of the country in that township.

I have examined the Chiricahua Mountains up to the Buckhorn Basin, all through the foothills, but not—well pretty well all through the mountains as far as Buckhorn
557 Basin; also, I have been up about Dos Cabeson.

I have examined the mountains to the south of Rock Creek, south of 17 south, range 30 east and township 18 south, range 30 east, or to the southwest.

I have extended that examination as far as the Swisshelm Mountains.

I was at the point in township 17 south, range 30 east, known as the Dunn Spring. I was at the Dunn mine in township 17 south, range 30 east.

558 From the slope of the country in Rock Creek, the float could not have come from elsewhere than in Rock Creek.

CROSS-EXAMINATION BY MR. MORRISON.

When I made this investigation of Rock Creek, I was in the employ of the Copper Queen Consolidated Mining Company, the defendant in this case. I am not in the employ of that company alone; I am in the employ of several associated companies. This one, I have been in the constant employ of it going on two years, but
559 have been working for them off and on a much longer time. I have no positive knowledge as to who controls these various consolidated mining companies. I know that James Douglas is the President, and that I work for

them, but as to what disposition they make of their stock, I don't know. James Douglas is the President of these companies of which I am a consulting engineer; 560
I don't say that I am the one. I went into Rock Creek Canon at the suggestion of the Copper Queen Company. I have been in the Chiricahua Mountains generally—I would generally say—between the limits of the Buckhorn Basin and Turkey Creek—on 23 or 24 different occasions. I was altogether 26 days out in those mountains, including, I mean both the east and west side when I named these limits north and south.

It is very hard to segregate the time I spent in Rock Creek Canon from the lower mill setting, up the canon, 561
but I should judge I had been in Rock Creek Canon and in that vicinity, all told, seven or eight days. I have camped there, and had been there, and ridden over there on horseback and left my horse and prospected on foot, there. I have been in Rock Creek Canon on four different trips. I was there in April, '96, about from the 10th to the 20th, inclusive, or 21st inclusive; I don't remember just exactly the day I came back. And then I was in there, not including the time of going and coming, I was in there from the 4th to the 11th of April, '98, and 562
from the 10th to the 23d inclusive, and from May the 11th to May the 14th. I have entered Rock Creek Canon several times by the wagon road, and through that trail, through the trail between Pine Creek and Pine Canon and Rock Creek, at the second setting, down through Cold Spring Park, and across the head of Pine Creek, and over on foot from the head of Turkey Pen across the ridge, and down on the Rock Creek side, and up the Rock Creek Canon, from the mouth of Rock Creek Canon up to the head of it, up through that way. 563

In my direct examination I made use of the expression "I wish to be very emphatic" for the simple reason that I considered that the mineral indications and the

subject was so emphasized in nature, that I had a right to use the word, because the facts justified it. I did not
564 consider the subject so important that I desired to particularly emphasize it by using that expression. What I meant to say was that the facts in drawing that conclusion, were sufficiently strong to justify an emphatic mention of the circumstance. That was a conclusion on my part. That is, the emphatic part of it. That is the reason I used it, to emphasize that portion of my testimony.

On my direct examination I started in at the mouth of Rock Creek Canon, about. I mean the distinct Rock Creek Canon where the foothills start up. The stream
565 goes below, and Rock Creek goes out to Sulphur Spring valley and into the valley, and that is open country, and still Rock Creek, but not Rock Creek Canon. At the foothills. I stated that I found what I called a large blow-out. That was not porphyry in Rock Creek Canon. I found a large outcrop of ledge matter; and in my experience where you find these large outcrops of ledge matter, they are indications of valuable deposits of metals, and it is one of the indications, ledge matter is, of ore deposits. I will confine myself to this particular
566 float. You just started with me about at the foothills as I came into Rock Creek Canon. The ledge matter there was quartz, stained black; oxide of manganese and iron.

It was quartz stained with oxide of iron and manganese; some of it was perfectly black and some of it also was white. I could not say as to whether that float had any gold or silver in it, from my personal knowledge.

I did not find any gold and silver in that rock. In Rock Creek Canon I found small quantities of gold and
567 silver; nothing more than a trace of gold, but I did not find anything greater in value than small quantities. The silver you could weigh but I didn't get any big assays there. Pardon me, I found a mineral deposit there that I think would pay to work. Only in the way of legitimate

chances, and mining, and probabilities; that is all.

A man would have to take his chances if he went to work there. 568

I took very few samples. I would like to state now with regard to my samples, in Rock Creek, that I took them in conjunction with other samples along up as far as I got, in order to illustrate the occurrences of certain ore deposits. Now I cannot testify; they are quartered. Very valuable information I have obtained from them, but I can't testify as to all my assays for I am not allowed to. I made a few assays of what I found in Rock Creek Canon; two or three probably. 569

I found limestone there, specimens of it, which showed little seams of mineral stain, and it would go about half an ounce in silver, and outside of that, there was one or two assays of quartz which gave a little silver and a trace in gold; not a large amount. It just simply showed the metals were present in the quartz. I don't think I had over three samples from Rock Creek, all told.

It went half an ounce in silver, per ton. That is not on a ledge at all, understand me, but simply of a mineral stained limestone rock. 570

The value of that half ounce of silver is about 30 cents. A trace of gold is probably of no value.

The highest assay value that I assayed from Rock Creek Canon, in gold and silver was 30 cents to the ton.

I call that a valuable mineral deposit where I found it in Rock Creek Canon and found 30 cents to the ton in silver. If you take a mineral deposit— If you go into any prospected mineral country where there are ledges, the silver and gold values are generally associated with sulphides, generally associated with pyrites, and with lead, and material of that kind. Where the ledges are barren, they are hard quartz, they are hard masses of ledge matter that are barren material in these ledges that are as- 571

sociated with mineral deposits, but where they are valuable they are full of sulphides. Now when decomposition
572 takes place, these hard masses stick up, above the ground in prominent outcrops, and if a man will go and look at them and take samples from them and assay them, he will find that they will go a trace in silver and gold. That indicates they are mineral bearing. If he goes and assays that ledge, where the pyrites have gone to pieces, has decomposed, he will find valuable mineral deposits; and it is a matter of common experience and every practical miner knows that these deposits of hard material that simply give a trace of metal, are valuable mineral indica-
573 tions and occur among the most valuable kind of lodes, and it is a common thing for that to be the case. And for that reason I don't say that this trace of silver, this 30 cents a ton, is valuable ore, but I say it is a valuable indication of ore, and of ore deposits.

This 30 cents to the ton would not pay to work. Nor the particular outcrop which I found; certainly not. But I mean to say if work were done on those ledges, that there is every indication there that they would furnish valuable deposits of ore. I testified that I believed the red
574 blow-out was a valuable mineral indication, and that it indicated the existence of, was an indication that indicated the existence of valuable ore. There is no valuable ore on the surface, but I believe if you would work on it there is a chance of getting a big mine there; that work would develop pay ore there, and that it would be a valuable property that would pay a man to take his chances. It would be perfectly legitimate mining proposition based upon the valuable mineral indication there. And that is the way the great mines are found;
575 I will tell you that, too.

I consider that the indications there would perfectly justify a prospector going there and working, with a reasonable expectation of finding valuable ore, and I be-

lieve that the showing there is sufficiently strong and promising to justify that work.

576 I would advise any one who felt able to do the work, to work on the red float I have spoken of, in the Rock Creek neighborhood. I mean any prospector who felt that he had the means to pay his expenses, and wanted to prospect. The prospector would not have to have much means. I would say that this was a legitimate place for a prospector to work; and if a man would come to me and ask me if I thought it was worth his while to prospect there, I would say "by all means, for it is one of the best places in the district you can prospect."

577 I looked over the country; but you were asking me about a prospector, were you not? I mean a prospector. I am not a prospector in the general accepted term of the word. I was not prospecting there. In the general accepted meaning of the term, as the word is used, I did not go in there as a prospector. I went in there to look at the country in Rock Creek and the vicinity in order that I might determine whether in my own opinion, it was mineral land or not; and in that respect, I prospected the country; but as a 578 prospector I did not go there.

I have worked claims of my own. I said I had prospected some there. After having examined and prospected Rock Creek in the way I did, I did not at that time proceed to do any development work there.

The policy of the Copper Queen Company is not to send out a prospector, and not to work on undeveloped mines. If they wanted to go out into the general field of prospecting, and to work on surface indications, and 579 such indications as large mines are very often discovered from, I would probably recommend them or tell them they would be justified to do work on just exactly that blow-out that occurs in Rock Creek, and to do work on it.

My experience as a mining engineer I think, justifies me in that conclusion.

580 I did not find anybody in Rock Creek Canon working on these locations that I found. I found work in Rock Creek Canon; I don't know whether they were locations or not. The work was several years old. It was only in one place that I found that work. There is a shallow opening, a cut, I should judge that big (showing with hands apart); there was 12 feet of work there. Several years old. I don't know whether it was located or not. I did not do any panning on Rock Creek. I did not consider it necessary to pan Rock Creek; I am not a placer
581 miner.

By Mr. Morrison: Isn't it a part of your experience or your investigation in going through this country over there, to test its mineral character by panning the creek?

Col. Herring: Objection. Sustained by the Court.

Witness: I found but one outcropping of limestone from the lower mill setting, up the canon, in Rock Creek. You can't tell how large it is; it is covered up. It sticks out of the ground. The widest place I saw it any place, it was 8 feet wide, and it was visible 200 feet long. I
582 say there is lots of slide rock there, and it sticks up above the slide rock and it is massive limestone. I got some pieces of it, and I could bring them here if you would like to see them. I didn't discover any valuable mineral deposit in that limestone, but it is apart of a recognized—Well. It is associated with eruptive rocks, and it would be an excellent place to prospect. I looked at it; I didn't dig any there. I didn't sink any money there.

By Mr. Morrison: And you haven't advised anybody else to sink any there have you doctor?

583 Col. Herring: Objection. Sustained by the Court.

By Mr. Morrison: Have you advised the defendant in this case to do any work where you found this indication?

Col. Herring: Objection. Sustained by the Court.

Witness: I found no work there where the limestone was. It is a good place to prospect and a good place to work. Just going down from the croppings, I found material that showed that the limestone was mineral bearing. 584

It is a fact that the mineral in the limestone that I say showed me it was mineral bearing, was the least possible speck of mineral. I say it was a good place to prospect there. If you find limestone in eruptive rocks, prospect there every time if you are a prospector and follow it out, too. 585

There was no prospecting at that place that was so indicative of valuable deposits. No evidence of prospecting there; it was an unprospected country.

I know where there is a valuable mineral deposit, and I don't know whether that would pay to work or not. I don't know whether that would pay to work or whether any of them would pay to work; they might pay to work very handsomely, and might not pay at all. That would be problematical, speculative, prospective. 586

I have examined the point on the map marked 8. There is a location notice up there I believe. I know the name by hearsay, and I might state the name of it, but I don't think I looked at the location notice. It was the Pure Stuff mine. The Pure Stuff mine and point 8 on the map represent the same place.

That point 8 is at the forks of Pine Creek. The location includes the point between the forks. The point is a high bluff. It is not a bluff exactly, for it is broken down some, but it is a very steep country. I think Prof. Blake and I were at this place together. I don't know whether I heard his statement about 8 or not, when he described it. 587

The country in this broken point at the forks of Pine Creek is an eruptive, soft rock, that is red, and has cavi-
588 ties in it that indicate that there has been pyrites or some kind of sulphides in it, and it is cut by irregular seams and veins of quartz.

I was there on my first trip with Prof. Blake, and I was there on the 11th or 12th of May last. That would be in the month of April and May. Those were the times I was up at this point 8. I found development work there. The development work was in this red porphyry, and on one of them was one of these streaks of quartz. That is iron stained porphyry, and a good deal of when
589 you break it open is white. The red color indicates oxide of iron, and that is what it was. It wasn't copper; it is oxide of iron, and has come from the decomposition of sulphide, in my estimation. I found another small color there; I found a speck of copper stain, that was hardly big enough to testify to. I found no copper there; I want to state however, that the witness Williams testifies to have worked since I have been there. I thought that was pertinent at the time I made the remark, but it might not be. I did not find any green stains in that particular
590 rock. I didn't find any green stains; except that little stain that I was showed; that small speck. I found one small speck. It was a little bit of a thing.

That red oxide of iron at that place is an indication of copper. The iron I found in that rock indicated the copper; the red iron color. It was not any green color that indicated that. It might be associated with gold and silver. Whether it is or not, I don't know. The indications wouldn't tell. I looked into the pits. I found
591 a cut and a pit; a pit and a cut with a small shaft in it. I looked in the bottom of those pits. I found red porphyry and quartz there. Practically the same as I found on the surface surroundings. I saw some material piled upon the dump; I don't know whether it was ore

or not. I don't know whether it had any value of not. I looked at it. It might be ore and it might not; I don't know. It was quartz. At the present time I don't think 592
it would pay to work.

I have done some work on mines. From my experience as a miner and my knowledge as a geologist and mineralogist, I would not go out there and continue the development of those holes I found at point 8, for this reason: I have prospected and I have worked as a mining engineer and I can do better than to go out and work as a prospector and better than if I had my whole choice of the mountain. So consequently I would not go there as a prospector and do that mining; and yet, if I were pros- 593
pecting, I would consider it, and I do believe it to be a legitimate and proper place to do work.

This prospect I found around there is the same as far as value is concerned, and possibilities are of the same problematical character as that on the other or Rock Creek side.

Below the first mill setting, I found another outcrop of limestone. Three or four miles below, I think. I don't know whether that contained any valuable mineral 594
deposit or not.

Limestone itself, as I found it there in Rock Creek Canon, is an indication of minerals. As a part of the general formation; of a limestone formation. By itself it don't indicate anything, as I found it there; the limestone itself is an ore deposit down there. It was in Rock Creek Canon and at this point 8 where I found this oxide of iron. All of Rock Creek Canon and the point 8 I spoke about. Oxide of iron is red. That is the color I found 595
there at that place you have just mentioned in your question. It gives the quartz a reddish appearance. It is not true that that color comes from and is absorbed by the earth; that color that I found there where the quartz was,

and that it is not a reliable indication of valuable mineral deposits, that red color by itself. There are streaks of
596 hematite running through with the quartz, that are red hematite, solid iron ore, and the iron stain comes from the decomposition in my opinion, of the pyrites in the porphyry itself, all through this blow-out of porphyry.

(Afternoon session.)

Tucson, Ariz., June 3rd, A. D. 1898.

Jury called. All answered names.

Dr. Louis D. Ricketts, recalled; had been duly sworn
597 herein and now testifies further in this behalf as follows, to-wit:

Further cross-examination by Mr. Morrison.

I spoke of red colored rock which I found to the north of Ross's mill setting. The red color is formed from sulphides of iron, undoubtedly, and may be formed from iron pyrites, by decomposition. I am quite certain it was formed from pyrites. Iron or copper pyrites. Either iron or copper pyrites, either one or the other, or both, to-
598 gether and by decomposition, give us this red color. I know this rock was colored in this way from pyrites, from the examination of mines that have been developed where there were similar outcrops that you could trace the sulphides from the red stained porphyry down to the ore, and find the sulphides below. I could tell from the examination of the rocks in Rock Creek Canon, and state positively from my examination of those rocks, as I found them north of the mill setting and at No. 8, and which I say are colored red, that the red color was formed by
599 pyrites of iron, from the decomposition of sulphides. That is my opinion. At that point, there is not any iron in my opinion, that I found that was not originally in the form of a sulphide. There is a rhyolite that is right there that caps the mountain, and there is a quartz ledge in

that, and the red color of that rhyolite I don't think is due to iron; I think that is due to a red feldspar. But this red outcrop I am describing, is iron. The red color in 600
this rock at this point north of the mill setting and over there at No. 8 was certainly sulphide of iron, but not in a metallic state. Yes, pyrites of iron; pyrites is not iron in a metallic state; it is sulphide of iron. It is not a fact that this color may have been produced from iron that was in spar, or iron in shale. It was in my opinion sulphide; it had been oxidized. That is my opinion. There is not a certain per cent. of iron in all those rocks of Rock Canon, that becoming decomposed, gives a red color; it is only in these blow-outs you get the red color, and if the 601
iron was there and oxidized and stained the rocks red, it would be red with iron. So, it was only where this porphyry occurred. This other is nothing like as high as where this place is where the porphyry and oxide existed. There is more or less iron mineral stain throughout that country in Rock Creek Canon. And it is red. Not in Rock Creek where the rocks stained red from this iron. There are two systems of ledge matter there that are entirely different. With the quartz ledges, the iron there is generally to a yellow color, and that is, yellow oxide of 602
iron containing moisture. But this porphyry rock that is oxidized and on the surface red, is formed of red oxide of iron, and has streaks and seams of hematite through it. If you would like, I could produce some samples of it and show them to you, if you would like to have it produced. I don't know about the value of this rock which I said I didn't know whether it was ore or not, that was taken out at No. 8 from the Pure Stuff mine. None of that was assayed. None of the ore at the Pure Stuff have I ever had assayed. There is rock piled up there and
float, on the sides of the quartz; I don't call it ore. It 603
might be ore; possibly it is ore. I think I testified on that very point in my direct examination. I did not necessarily mean it was ore. I didn't sample it. I examined it.

7

Morgan Hudspeth, called to sustain the issues on part of the defense, and being first duly sworn, testified as
604 follows:

By Col. Herring:

My name is Morgan Hedgpeth. I now live at Tombstone. I know Rock Creek in the Chiricahua Mountains. The first time I was there, I think was in '93. I know the place on Rock Creek where the timber was cut. I was there in '83 and '84 and a part of '85. '93 I mean to say, not '83.

I was employed by Daniel D. Ross, now deceased. I
605 was driving team for him and hauling lumber out of there. I went there, I think it was in May of '93, and I was there then the most of the time until in the neighborhood of March, I think, of '95. I hauled from the upper mill setting. I hauled with horses. They had skid roads from the mountains to the mills, and they drawed the logs into the mills with horses, and put the logs into the skid roads there, with cattle. I was up and down that Rock Creek Canon about twice a week. There was but very little feed along the sides of that canon, for
606 cattle or horses. We hauled feed in, corn and hay, and fed them, from Tombstone sometimes, and from Willcox and sometimes from Bisbee. They never turned the cattle loose. When they got through using them they would turn them loose. The cattle would take the road and go to the ranch. They used to start them down the road and they would take the road and go to the ranch. While I was up and down Rock Creek, driving a team, there was a little ranch just below the first mill setting or right at the mill setting; rather close by it. There was a man
607 by the name of Teddy Fitch was trying to raise a few vegetables there, but he never raised anything to amount to anything. It was considered a failure to raise anything there. He tried alfalfa and it didn't do well there, and he plowed it out and put some fruit trees there, and

the trees grew thrifty enough, but I never saw any fruit on them. I think it was in '94 he was working there a good deal planting vegetables and one thing and another. 608

He finally got through and quit there. I don't know whether he went away from the mill before I did or not. I think maybe he worked at the mill after I went away. He quit farming. I think he had perhaps four or five acres fenced around up on the hillside. He didn't have more than half an acre of level ground. That hill was very steep. Those mountains were very rough and steep. A great many places where they done that logging up there, was very rough. They used to frequently treble their work cattle there logging on those places where it 609 was rough and rugged.

I never did see any cattle in that Rock Creek at all. I never saw no cattle, stock cattle on Rock Creek all the time that I teamed out of there; that is, over from where the first mill setting was, up.

CROSS-EXAMINATION.

By Mr. Ellinwood:

There was very little grass in places in that country. 610 I never saw but very little grass there anywheres. Where they cut and logged that timber, I never seen any grass nowheres. Neither between the trees nor out from the trees. I was on the road all the time. I never turned my stock loose in that country. I have teamed in countries where there was good grass, where I turned them all out and didn't use any hay at all. You can haul and freight and do heavy work with teams on grass and barley; if you have plenty of barley to feed them you can. You have to have barley when you feed hay, too. If there was 611 patches of grass between those trees I never noticed it. I couldn't say there was. I believe I testified here in '95 on the former trial of this case. There was a little grass, I think, as I stated before. The grass was very short and

light, what there was. There was some grass; I don't say there wasn't any at all. Right above the upper setting
612 across the canon on the hill side there was some grass grew quite tall. I never turned my stock loose.

I don't think I ever was quite up to the top, but I was pretty near to the top where they cut a good deal of logs. I never seen any cattle on Rock Creek up there. I saw sheep up there. I couldn't tell how many sheep. There was quite a band of sheep taken by there, and I seen the sheep when they were going up with them. I saw the sheep up in the mountains. They had them on the mountains above the mill there, and there used to be
613 some sheep get down to the mill, and I saw some of them after they took the sheep down, as far as Jim Tompkins' place on Turkey Pen. There were 18 or 20 head down there that got away from them and started down there.

I think altogether Fitch had fenced maybe 4 or 5 acres; I could not tell. There might not be over 3 acres, and might be 5. He raised a few potatoes I think and a few cabbage. I believe he furnished them at the mill there; the men, some of them. I heard he did. He told
614 me he had sold it up there; I don't know only what he told me about it.

I don't see anything about that picture that I remember (After having been shown a photograph).

RE-DIRECT EXAMINATION.

By Col. Herring:

Those sheep that had strayed out there looked very poor. I don't think he ever did come and get them; some of them died there. I saw four head there that died
615 there.

Q. Now Mr. Ellinwood has asked you about the sale of vegetables by Fitch up to these men at the mill. Will you state how long it took these people at the mill to

whom he sold the vegetables he had raised in a year to consume them, if you know? A. I think they ate it up in one meal. 616

Mr. Bennett: I move to strike out what he thought.

Mr. Morrison: It is not of his own knowledge and I move to strike it out.

RE-CROSS EXAMINATION.

By Mr. Ellinwood:

I don't know whether he furnished vegetables from time to time. That one year is all I know about his raising vegetables, and I think that was in '94. I don't know whether he brought them on several occasions. That is not the way he made his living on the ranch; he worked for Mr. Ross most of the time. Used to help load the teams, and help them up in the mountains. 617

There was no boarding house there.

Dr. Louis D. Ricketts, recalled; had been heretofore duly sworn in this behalf, and now testifies further herein, as follows:

By Col. Herring: 618

I was under the impression when I was questioned by Mr. Morrison, that I had taken ore off the dump in Pine Creek where Mr. Williams' location was, and assayed it, but I didn't have my notes with me; and to make sure I got my notes from my room and found out that in transcribing from my notes, from the original notes, that I had made a mistake, and that I had assayed a piece of ore from that lower dump; and I testified just now that I hadn't. It was a mistake and I wanted to correct it.

619

CROSS-EXAMINATION.

By Mr. Morrison.

It was not of any intrinsic value.

RE-DIRECT EXAMINATION.

620 By Col. Herring.

The piece of ore that I assayed was of no intrinsic value.

W. C. Hurd, called as a witness to sustain the issues on part of the defense, and having been first duly sworn in this behalf, testified herein as follows:

By Col. Herring:

My name is W. C. Hurd. I reside in Bowie Station. That is in the Chiricahua range. The town where I be-
621 long is not in the mountains; the town of Bowie Station. Where I live, that is in the mountains. I live in the Chiricahuas. I live in Tevis mining district. The place where I live is in the western end of the Chiricahua range.

J. H. Tevis, called on part of the defense, and being first duly sworn, testified herein as follows:

By Col. Herring:

My name is J. H. Tevis. I live in Tevis town, Cochise county. I lived here years before there was any
622 Pima county. I lived there before it was in Pima county and before it was any county only Dona Ana county; I have lived there since '57 in that vicinity. I know every foot of the Chiricahua Mountains I guess, from the north to the south.

Tevistown is another name for Bowie Station. Tevistown is the postoffice.

I am engaged in mining in the Chiricahua Mountains, on the northeast side, about five miles from the
623 head of this same creek in contention. Rock Creek. I think it is about five miles on the other side of the divide to the red hills. And then I have mined in the Dos Cabesos district, and have mined from one end of the Tevis district to the other.

Charles W. Cheney, called for the defense, and being duly sworn, testified as follows: 624

By Col. Herring:

I reside at Tucson. At one time I resided in Cochise county. I was there engaged in mining, and a cattle ranch. I was engaged in mining about 7 years I think, in Cochise.

By Col. Herring: State what mines in Tombstone you have mined in?

By Mr. Morrison: Objection. Overruled by the Court. 625

Witness: I was occupied with the Tombstone Mill and Mining Company, and had charge of probably a gang of 15 to 18 men. At one time I was in charge of the mill and mines; also with the smelter connected with the company. While I was engaged in the smelter it was at the town of Charleston on the San Pedro river.

F. D. Williams, called as a witness to support the issues on part of the defense, and being first duly sworn testified as follows, to-wit: 626

By Col. Herring:

By Mr. Herring: What kind of float did you find upon your land?

By Mr. Bennett: Objection. Overruled by the Court.

Witness: I found copper float. I found copper float in perhaps 20 or 30 different places, and perhaps more.

Ed. L. Wetmore, called as a witness to sustain the issues on part of the defense, and being first duly sworn was examined and testified as follows: 627

By Col. Herring:

I am an assayer. I have seen Mr. Williams before he was in this court room a short time ago on the witness
628 stand.

By Col. Herring: Will you state whether he had or not recently delivered to you for assay, any copper ore?

By Mr. Bennett: Objection. Overruled by the Court.

Here the certificate was marked by the reporter at the request of the counsel for defense, for identification, as follows: W.

Ed L. Wetmore.
629 and Doc. Ev., also
former testimony.

prove, is refused.

Col. Herring: We introduce in evidence, the subpoena for Harry Cook, and the return of the marshal that Harry Cook is not to be found within his district, and that he is said to be in the state of California.

Whereupon, we proceed to read, under the agreed stipulation, the testimony of the witnesses who now are
630 not within the jurisdiction of the court, on the previous trial of this case, and which stipulation provides that the testimony of such witnesses may be read in the case to the Court and jury subject to such objections and exceptions as were taken on the trial at that time, and subject to any such other or further objections as may be made in the premises upon this trial.

Testimony of "Harry Cook, a witness called on the part of the defendants, and sworn, testifies as follows:

"Direct examination by Mr. Herring.

631 "In those years I have done mining and prospecting. "I prospected in the Chiricahua Mountains, in Dos Cabe-"sos mining district, in the Chiricahua mining district "and in the California mining district.

"In '78 I was prospecting in Pinery Canon. I have "claims now in the Chiricahuas, between Pinery and Whitetail, right on the summit." 632

"I know the position of the Dunn mine in that "mountain and of some of the other mines in the vicinity "of that mine in the mountains. I prospected some in "Rock Creek. I have done panning there. I got several "colors to the pan. It was done in Rock Creek and in "several smaller branches coming down towards Rock "Creek. This was in 1880.

Testimony of

"H. W. Hopen, a witness sworn for the defend- 633
ant, testified as follows:

By Col. Herring: I now offer in evidence, the subpoena issued for Mr. H. W. Hopen, together with the return of the marshal on the same that he cannot be found within his district, and that he is said to be in the state of Oregon.

Direct examination by Col. Herring.

"I live at Pinery Canon, Cochise county, Arizona. "I have lived in Cochise county since '85. At present I 634
"am engaged in the cattle business. Have been engaged "in the cattle business since '87. I have lived in Cochise "county since May 16th, 1885. I am acquainted with the "Chiricahua Mountains. I know the mountains in the "vicinity of Pinery Canon, Pine Canon and Rock Creek. "The first experience I had in those mountains was in the "summer of 1885, when I was employed by the govern-"ment in running a pack train going through there dur-"ing the Geronimo campaign.

"During 1885 and 1886 I presume I was through 635
"there 20 different times, on different routes.

"I have been through there for the last two years "probably once or twice a week; sometimes twice a month.

"During the spring of the year I was up there quite fre-
"quently branding calves and driving them out.
636
"Since I have been in the county I have mined and
"prospected there, and prospected and worked for wages.
"I worked in the Dos Cabesos and in the Turquois. The
"Turquois district is not in those mountains. The moun-
"tains I have been in are in the foothills of the Chirica-
"hua Mountains in Cochise county. I have been over in
"the Rock Creek country gathering up cattle and rounding
"up cattle for the last three or four years, quite often.
"The only prospecting I have done in that canon was in
637 "June, 1886. We laid over there for further orders from
"the government. We were on the Geronimo trail and
"stopped for further orders, and during that time it
"showed a mineral character, and I prospected some in it.
"I saw a great many quartz ledges up and down the canon.
"I prospected some with a pan and found some colors of
"gold. I saw an assay from the ledges I prospected in
"Rock Creek. Saw the returns from the assay. Where
"I panned and obtained the colors in Rock Creek, was
"about three-eighths of a mile from the lower setting in
"Rock Creek. "At that time the timber was not cut at
638 "the place where I mined. It has been since that. There
"were quartz ledges there, copper stained and iron stained.
"At the present time, the lower mill setting, the first ledge
"I discovered was right in the vicinity of where the timber
"was cut, on the left hand side of the mountain, as you
"go up the creek, about one-fourth of a mile from Fitch's
"ranch. There is a ledge there. It is quartz, copper
"stained and iron stained. It cropped out very large there.
"It was a very rough country; steep, rocky, broken up
"and falls off, and is precipitous. In my packing I found
639 "it pretty rough and broken, and we had to retrace our
"route in order to get around by the trail and we lost sev-
"eral packs. On one trip we left four pack mules on the
"trip. They fell over and we hadn't time to get them. In

"the country of Rock Creek and its vicinity, and the place
"where the timber was cut for the purposes of pasture,
"there is no pasture to speak of. There is what is called 640
"'Sour Grass', that is what it is known as, among cattle
"men. That comes up all at once, and attractive to cattle
"when it first comes up, but it dies in a short time and
"the leaves fall off. But some of the cattle eat it, but it
"is generally the old steers, and they run and hide from
"the men and they eat this grass. Last year's gathering
"of steers we killed 4 getting them out last spring. I say
"this from my experience as a cattle man. I know of
"three different parties and heard of different parties who
"attempted to raise crops in those mountains. The result 641
"was they didn't raise anything. The reason why they
"didn't raise anything, the frost was too late in
"the spring and came too early in the fall. I think no
"person could live by agriculture in that place. I have
"lived right below the mouth of the canon and it was al-
"most impossible for me to raise anything, and I lived
"down on the flat and had plenty of water. When I was
"packing through there, I could not rely on pasture for
"my animals to any extent. We had stations, one at
"Tonto, one at Turkey Creek, one at Rock Creek, and at 642
"White River, Old Camp Price, Skeleton Canon, Gayley-
"ville and Wood Canon, Cloverdale and Loui's ranch.
"You could trace that ledge I speak of five hundred yards.
"I horn-spooned that ledge. I tested it in two places. I
"got colors of gold. I know Pinery Canon. Dos Cabeson
"is about 23 miles from the mouth of Rock Creek. You
"can gather the young cattle and cows and calves, but it
"is pretty hard to gather the old steers. Some of these
"old steers would stay there where it was rough and
"brushy, and they would get hid away, and they didn't
"want to go where they could get anything much to eat, 643
"but I suppose they did come down at certain times of the
"year. They gather them up in the spring of the year.
"They feed on this green grass, this sour grass, and they

"drink water and die if left on that. We had to kill most
"of the old steers to get them out of there.
644

"From the Dunn mine to Ross's upper mill setting
"is, I should judge, four and a half to five miles. On the
"south hillside there is pine grass, but stock doesn't pay
"much attention to it. Then the stock we have got up
"there don't pay much attention to the grass, after it
"grows; but they just stay up there and eat the young
"grass that comes up. There is some brush up there. Some
"cattle stay there through the year. I saw three differ-
"ent ledges in Rock Canyon. One ofthem is at the head of
645 "Rock Creek coming down from Fiy Peak, and over to the
"left above Mr. Fitch's ranch, and the other crosses the
"road again. The road leads over from Turkey Canon
"to Rock Creek. I call that a quartz ledge. I don't know
"whether it bears any mineral. The one on the hill above
"Mr. Fitch's ranch bears mineral. I know it because I
"have prospected it. I know it contains mineral because
"I horn-spooned it. I got colors from the ledge. I got
"it by pounding the rock and panning the pulp. I took
"the pulp and panned it. There might have been a color
"in it like that; but that ain't gold. I have prospected
646 "enough rock to know gold when I see it. I have never
"discovered the metal that I could not distinguish gold
"from another. I have never been fooled in the coloring.
"I never saw any of that. You can tell that you are not
"fooled, by putting acid on gold. I did it. I took it with me.
"I panned out enough to put acid on. I remember get-
"ting five colors in one piece. By five colors I mean five
"different pieces. I didn't say five different pieces to get
"a color. I say a separate piece would give me a color.
"The biggest piece I would get from pulping that gold
647 "was very fine. It is hard to describe how big, but you
"could see it very distinctly with the naked eye. You
"would have to horn-spoon the pulp before you could see
"it. I started with probably a hand full of pulp. Then

"I got three or four colors. That ledge might pay. It "would be a low grade. It would pay to work on a large "scale. As it was then, it would not pay a poor man to 648
"work it, I suppose, but it would be a very promising "piece of property by developing it. I have seen develop- "ment done on it. Mr. Shaw has located it. He located "it last fall. Shaw has done considerable work on it. I "couldn't tell you whether he is working it now or not. "I saw Shaw working on it in the fore part of September. "I saw them working on it. He has a Mexican. They "probably had 4 feet of work when I was there. They "just commenced working then. They were working there "then. I haven't saw them since. I have not been up 649
"there since. I do not know whether they went over 4 "feet or not, they were working there. They found gold "and silver. He showed me the assay. The return came "from Tombstone. I know what I saw with the naked "eye. He showed me the return. I saw the timber after "it was cut. I saw the stumps after the timber was cut.

"I located one quartz ledge.

By Col. Herring: That is all of the testimony of Mr. Hopen. We next offer in evidence the subpoena for 650
Geo. I. Redstreak and the return of the United States marshal thereon that George I. Redstreak is not to be found within his district, and is said to be in California. Under the agreement in this case, we proceed to read the testimony of George I. Redstreak.

"George I. Redstreak, a witness sworn on behalf of "the defendants, testifies as follows:

"Direct examination by Col. Herring.

"I reside at Tombstone. I am an assayer. I am en- 651
"gaged at Tombstone, and am in the employ of the Tomb- "stone Mill & Mining Company of Tombstone. On an "average I make about five thousand assays a year. I "have received samples from Mr. Frank Abrams. I have

"made assays of such samples. I have been in Rock Creek
"Canon myself, in this district here between the red lines
652 "shown on this map. I was there in the early part of
"September. I come into Rock Canon from Turkey Pen
"Creek, but I am not familiar with the names of the
"places. I went in there over the Juniper grade into Rock
"Creek and I went clear up Rock Creek from the divide
"down to Cave Creek, and along the ridge up there around
"Heliograph Peak, and Fly's Peak. I was in a party con-
"sisting of Mr. Sorren, Mr. Abrams and Mr. Hadley. I
"was at the upper mill setting and camped there several
"days. In going from Turkey Pen Canon, I passed over
653 "Juniper Hill, the grade from Fitch's. I took samples
"myself from that grade. I took a sample of quartz ledge
"right along side of the road right on the grade. I took
"a sample from the left hand side of the road going up,
"from what is called the Alma mine. That sample was
"taken from a ledge of quartz, iron stained. It must have
"been in Rock Creek, because I was over the divide. Com-
"ing over from Turkey Pen Canon into Rock Creek.

"Those are the samples I received from Abrams and
"which I returned to him and which he has been testify-
654 "ing about.

By Col. Herring: "Now take them in the order in which they occur and state what your treatment was."

By Mr. Ellinwood: Objection. Overruled by the Court.

"I made an assay of the ore in that sample. This is
"A-2. I have a memorandum of the result of that ore.
"The memorandum was made by myself at the time of
"making the assay. The next one is a sample from the
655 "mine, and is No. A-8.

Joseph Smith, a witness sworn for defendant, testified as follows:

By Col. Herring.

I was not perfectly acquainted with John I. Redstreak the assayer, out in the Chiricahua Mountains in '95. I did not meet him. I did not have a mine there 656
known as the Smith Brothers' mine. I knew of a mine there known as the Smith Brothers' mine. It was in Morse Canon.

George I. Redstreak.

Here Col. Herring goes back to the reading of the testimony on the formal trial, of George I. Redstreak as follows:

"I took samples myself. I took a sample from the "Alma and one from that ledge alongside of the road on 657
"the Juniper grade. The sample of the ledge on the "Juniper grade between Turkey Pen and Rock Creek, "passed over the divide. Yes, sir. "No gold and 15-100 "ounces of silver." I took a sample from the Alma. That "went a trace of gold and 6-100 ounces of silver. I as- "sayed the one that I testified he gave me a sample of. I "have a memorandum of that one.

Col. Herring: (resumes reading.) "State whether, "from your examination of the ledges of quartz in Rock "Creek, whether those ledges are of such a mineral char- 658
"acter as to justify a reasonable expectation of the part "of a prospector or miner in finding valuable ores, by "developing such ledges?"

By Mr. Bennett: Objection. Overruled by the Court.

"I remember which of these samples I took from "Rock Creek that I took from the ledge myself. The "sample I took from the ledge I have described, in the "Chiricahuas where it showed a trace of gold on the sur- "face, was taken from the ledge in place." 659

By Mr. Bennett: Objection. Overruled by the Court.

Cross-examination by Mr. Smith.

Motion to adjourn.

660 By the Court: Gentlemen of the jury, the Court is about to take a recess until tomorrow morning. Again I caution you to bear in mind the admonition not to converse with any other person or suffer any other person to address you on any subject connected with the trial of this case; not to form or express an opinion but hold your judgment in abeyance until the case is finally submitted to you.

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661 Tucson, Ariz., June 4th, 1898.

Court met at 9 A. M.

Jury called. All answered names.

The Court: You may proceed.

Joseph Smith, recalled for the defense; had been duly sworn in this behalf, and now further testifies herein as follows:

By Col. Herring:

662 I stated that I lived at Willcox. I know Rock Creek Canon. Have known it about eleven years. That is the length of time I have lived at Willcox. Before that I resided on the Gila, in Graham. I have seen limestone in Rock Creek Canon, in two places near the lower setting. One place on the side of the hill about a hundred yards south of the mill setting. This limestone was about 10 feet wide. I could observe it on the surface as far as 250 or 300 feet in length. I have also seen limestone on the north side opposite the lower setting. It is probably 50
663 feet wide there, and three or four hundred feet in sight, in length.

I have known the place known as Teddy Fitch's place. There were fruit trees there. In the course of the

eleven years I have lived there, I have frequently passed up and down that canon in the vicinity of Teddy Fitch's place, in the growing season, in the fruiting season. I never saw any fruit on any of those trees. Those trees were dug up and moved down into the valley. Mr. Plum dug them up. He is my brother-in-law. I know they were dug up, and taken down into the valley. My brother-in-law was at that time the owner of those trees. He bought them or traded for them, at Fitch's place. He gave two horses for them. The amount which was the subject of the trade was thirty-five dollars, for the entire ranch. 664

665

CROSS EXAMINATION

By Mr. Morrison.

I have mined some. I don't know just how long. I have mined a little on and off for the last couple of years. I have prospected. Not for any special time; just on and off a very little while. I am prospecting all the time whenever I am anywhere. My employment is most anything that I can get work at. I have worked with cattle and most everything. I have no special calling. I have followed cattle business more than anything. I have done very little farming. At the time I was subpoenaed to come to this court, I was prospecting. In the Chiricahua Mountains. I had been doing that about a month. I have prospected some in Rock Creek Canon. I was in there two or three different times. 666

By Mr. Morrison: Did you find any valuable deposits of mineral in Rock Creek Canon?

By Col. Herring: Objection. Sustained by the Court. 667

Witness: I knew what I have been talking about was limestone, from my observation and looking at it. I have seen limestone there as long as I can recollect and have

lived always where limestone was. It was the size I have described it. I found it in two places. One about 100
668 yards south of the lower mill setting. I don't think I said one was 250 feet to the north. It is less than half a mile from the Teddy Fitch place to the north of the old mill setting. They are both one and the same. I have found limestone at other places in Rock Creek Canon—down about two miles and a half or three miles down Rock Creek, below the lower mill setting. The timber was cut at the time I saw this limestone. The first that I saw any limestone, I couldn't say just when it was, but it was something like two years ago, or nearly so. I was not
669 with anyone at the time I found this limestone. The way I happened to observe this limestone, was that I was hunting and prospecting around. I was prospecting and ran across it. I never saw fruit on the trees at Teddy Fitch's place. I couldn't say that those trees positively never did have any fruit on them; I wasn't there all the time; but I was through there most every few days, and I never saw them have. I never saw any fruit there. It would be impossible to know that there never was any fruit on them; I couldn't say that. Teddy Fitch raised
670 some few cabbages, turnips and other vegetables there on that place. I have been in the lower part of Rock Creek Canon after cattle. I do not recollect ever having seen any sheep in Rock Creek Canon. There is a little grass in there. On the lower part, up about a mile, there is a little grass in there and some cattle come in there, some very few, but farther up than that, I never have seen any cattle.

Ben Williams, recalled; had been sworn in this behalf for defense, and now further testifies as follows:

671

By Col. Herring:

I have had charge of the business of the Copper Queen Consolidated Mining Company, the defendant in

this case, as agent, ever since its incorporation. The defendant company have never employed Daniel D. Ross.

672 By Mr. Morrison: Objection. Overruled by the Court.

By Col. Herring: Mr. Williams, will you state whether the defendant, Copper Queen Consolidated Mining Company has ever cut any timber in Rock Creek Canon, in the Chiricahua Mountains?

By Mr. Morrison: Objection. Overruled by the Court.

Witness: They did not.

678 No agent of the corporation ever cut any timber in Rock Creek Canon in the Chiricahua Mountains. No timber which the company purchased, was ever exported from the Territory. This timber was used for mining and domestic purposes at Bisbee—for other domestic purposes.

CROSS-EXAMINATION.

By Mr. Morrison:

I do not know that the Copper Queen Company cut timber personally, in Rock Creek Canon. The Copper 674 Queen Company had a contract with Daniel D. Ross to purchase timber from him. I do not know positively whether that arrangement was made prior to the cutting. I think when I was on the witness stand before, I said I believed it was. I think so now. I did not know at the time the agreement was made with Daniel D. Ross to furnish the Copper Queen with timber, it was Rock Creek Canon. I can't say that I knew it was at the place that I know now to be Rock Creek. We bought is supposing it to be on mineral lands. That we did suppose. 675

I think I did not state while on the witness stand before, that at the time this agreement was made for the cutting of the timber with the Copper Queen Company

that I, as agent of the Copper Queen Company, knew that this timber was to be cut in Rock Creek Canon in the
676 Chiricahua Mountains; I think I said I believed so.

By Mr. Morrison: You believe that now don't you, just the same?

Col. Herring: Objection. Sustained by the Court.

Mr. Morrison: Exception.

I will have to explain the question asking me if it is not a fact, that I believe that fact now, in refernce to the cutting of this timber on Rock Creek Canon just as firmly as I believed it at the time I testified for the government,
677 by stating that at the time I didn't know where Rock Creek was, and did not know until later, the exact position of Rock Creek. I know now. At the time I speak of, I did not know the timber being delivered was from the Chiricahua Mountains from Rock Creek Canon. I I didn't go into the mountains until some time after; but I believed it was from the Chiricahua Mountains. I learned it was being cut on mineral lands, and thought we had a right to purchase it the same as purchased any other supplies. I did not go up there to see. I did not send anybody there.

678 George Christ, sworn for defendant, and testified as follows:

I reside at Tucson. I hold a public position in Tucson. Position of Surveyor General. As such I have in my official custody the field notes of surveys which have been made on lands within this land district. Of the Tucson land district.

(Witness produces original field notes in his office of township 18 south, range 29 east, Gila and Salt River
679 meridian.) That is it.

Township 17 south, range 30 east has been surveyed. Township 17 south, 29 east, has not been surveyed. Township 18 south, 30 east has been surveyed. I have not those

field notes. This memorandum that was given me I hadn't seen it until I got here. I was not at the office when the subpoena was served, and probably I don't understand 680
this. Come to look at this memorandum, I don't think it has been surveyed.

I did not make the memoradum. It is not in my handwriting, it was made by the Chief Clerk. I do not know anything about whether it has been surveyed, myself. Not understanding this memorandum, I don't know whether township 18 south, 30 east has been surveyed or not. Let me explain. This is a matter that has never been referred to since I have been in the office, and simply 681
coming into the office and taking this memorandum, and being subpoenaed to come here, I am not in a condition to testify. I think this clerk is the one who ought to have been subpoenaed. If it has been surveyed, I have the field notes. I have not the field notes of 18 south 30 east with me. I was not requested to bring them. My subpoena is down in the office; I don't know whether it reads that way.

Here the certified copy from the United States Land Office, Washington, D. C., of John B. Treadwell, Exam- 682
iner of Surveys of the General Land Office, being a report in relation to the mineral character of the lands in township 17 south, range 31 east, Gila and Salt River Meridian and in relation to the lands in township 16 south, range 31 east, Gila and Salt River Meridian, was marked by the reporter "X" for identification.

By Mr. Bennett: The first witness offered by the plaintiff in rebuttal, is Charles Hood, whose testimony was taken at the former trial, and by agreement is to be 683
read from the transcript.

Charles Hood, a witness sworn for the plaintiff, in rebuttal, testified as follows:

By Mr. Bennett: "Did you hear any further con-
"versation concerning the justification or excuse for cut-
684 "ting the timber there over that ground?"

By Col. Herring: Objection. Sustained by the Court.

R. H. Connor, a witness sworn for the plaintiff in rebuttal, testified:

By Mr. Morrison:

My name is R. H. Connor. I have been in Rock Creek Canon, Cochise county. I was there in May, '94 I
685 think. At that time I was special agent for the government. I was there from May 12th until May the 20th, 1894, and I think some time in August or September I guess. I was in there twice. When I was in Rock Creek Canon in May, '94, I was over an area approximately, of 6 or 8 miles east and 4 to 6 miles north and south; possibly more. Six to eight miles east and west, and four to six miles I suppose, north and south; may be 8. There was considerable grass up there at that time. My first trip we went in from the south, up Turkey Creek Pen.
686 We went in there with a double team, with horses.

By Mr. Morrison: Tell us how you fed your horses while you were in there.

By Col. Herring: Objection. Sustained by the Court.

By Mr. Bennett: Exception.

By Mr. Morrison: State whether or not your horses were fed any hay while they were in Rock Creek Canon
687 on this trip.

By Col. Herring: Objection. Sustained by the Court.

By Mr. Bennett: Exception.

We found grass on the sides of the canon hills. I know where the forks of Rock Creek Canon are. There was fair grass up in the canon. While I was up between 688
those two forks, I found considerable grass and quite a number of head of sheep up in there, grazing. I think about 3500 or 4000 head of sheep, was my information. The sheep were up there from the time we went in until we left; we left them there still grazing. We didn't see a great many cattle in Rock Creek Canon; there were a few.

From the lower mill setting to the upper mill setting there is rather a narrow part of the canon, and in some few places that widens out some. The grass is pretty good. The mountain on the south side of the canon 689
sloped gradually back quite a ways, and then began to get steeper, to the summit of the hill, and gradually wider on the south side from the bottom of the canon to the top of the mountain on the south side, and a gradual slope on up to the east to the top of the range. It slopes from the backbone of the mountain, west. In May '94 I went in there with Mr. Ellinwood and Mr. Flipper to examine the character of the lands and the cutting of the timber. In September, '94, I went back to get the stumpage diameter for what had been cut. I think I was 690
there four or five days in September, '94. I don't exactly remember as to the grass at that time; didn't pay much attention to it.

This picture represents a point somewhere near the top of the range of the Chiricahua Mountains, northeast of Rock Creek, as well as I remember. I think it lies up on the divide, somewhere up on the divide. I think east of Rock Creek. Just on top of the backbone of the mountain. It is quite level up there. The mountain 691
slopes both ways there. I think the picture represents a part of the country that is outside of the Rock Creek Basin. I think this photograph does not represent any part of the land from which the timber was cut.

R. N. Leatherwood, sworn as a witness for the plaintiff in rebuttal, and testified as follows:

692 My name is R. N. Leatherwood. I am sheriff of this county at this time. I have lived in Pima county, thirty years. I have had several occupations during that time. I used to be a corral keeper here, and a miner. I am anything; I work. I have been a miner about 35 years. First in Montana, next in Colorado, and from there down to New Mexico and into this country, and have remained for thirty years. In Arizona for 30 years.

693 I know Rock Creek Canyon; have been there three or four times. The first time I went there probably has been 20 years ago. I went there with Governor Safford and a gentleman named Bidwell. The next time was probably fifteen years ago. I went there with Tom Chatman. I had a mine in that country, in the Chiricahua Mountains. I was in Rock Creek Canon in the year 1890. I think we got there on the 11th of May in the evening to the first mill setting. I think we were there 8 or 9 days. I was there with Flipper, the gentleman over there, and another gentleman whose name I can't recollect now. I was hired
694 to go there and look at the country and the ground as to its mineral qualities; that was my business there. We started to investigate from the first mill site by the creek and it is a little creek that comes down out of the mountains, out of the Chiricahua Mountains. I went there to investigate this section of the country, and we started in from this mill site. They had commenced cutting this timber and we were there for that purpose, I understood was our business. And we looked over that country for this length of time, 7 or 8 days, or 9 days, I think it was—
695 or maybe 8 days. The country that I examined must have been 7 or 8 miles from west to east. We went from the west up to the east up in the mountains probably four or five miles in width. I don't know either, for we walked and it is a mountainous country, and in such a country

you can't tell how far you go. We went over the country on foot. We began our investigation about six o'clock in the morning. We started early every day. We would 696
finish our daily work there from 4 o'clock to 7 in the evening. We found the Chiricahua Mountains is one of the principal mountains in this Territory.

Rock Creek Canon is a timber country, that portion of the country; it is heavily timbered; that is the character of the country. Rock Creek Canon is in a gorge, only it is not very abrupt. Ridges run down in this canon, and in places it is steep, and in other places there are more or less flat places where you could get an acre or two and you 697
might have a little field there if you wanted one—a small place. I didn't find any mineral. I worked there 8 or 9 days and I would take my pick with me, and I would break the rocks, trying to find mineral. It is a porphyritic country; that is the character so far as the rocks go. We found a little lime in the country, and we found iron, but the principal thing we found was porphyry in that part of the country. That is all I found. I didn't find any valuable minerals in Rock Creek Canon. I worked diligently. I took samples while I was on this investigation in 698
Rock Creek Canon. The first sample I took was off to the left of the upper mill site at the hills. We found some—well I would say a belt of porphyry heavily impregnated with iron and it looked to be mineralized; it might have mineral in it; I think so. I took a sample of that rock, the first sample. I put the samples in a sack and brought it here and turned it over to one of the professors at the university. I took four or five pounds; about as fair a sample as a man would take. I gave it to the professor of the university at that time four years ago. 699
Comstock, I believe, Professor Comstock. I marked that sample. I marked it as sample No. 1, from that section. I then took I think it was two samples of porphyry. Not at the place I speak of; right the other side. That place

was between the two mill settings to the east of the setting; that would be on the west side of the mountain,
700 about midway between the two mill settings up on the hill to the right. The side from which I took these second samples would be on the right hand side going up the creek, but it would be on the west side of the mountain. The mountain runs from the east to the west more in that general direction I think. The sample I took was simply country rock; that was all there was to it. It was porphyry. I marked that sample 2 I think, and 3. I brought those samples here and give them to Prof. Comstock. I took I think, two more samples. The place where I took
701 them was still farther to the west on the Turkey Creek, Turkey Pen Creek I believe they call it; there, I took two samples from a ledge.

The distance from the lower mill setting was—to the west?—To the south—let me see—I think about—well, probably 2 miles; I don't think more than that. It is about two miles. Over the divide to Turkey Pen from Rock Creek. Turkey Pen—there is two Turkey Pen Creeks. There is Turkey Pen and Turkey Pen Creek, I
702 think. Those samples were from a ledge. I did not see any valuable minerals in the ledge. It was a location. It was a mine; it was located for a mine. This ledge had been located and a little work done on it, a bit of a hole probably two or three feet deep; a little bit of a place dug out on the ledge. I think the work might have been done a year or two before I was there; I don't know. The timber was cut at this point that I saw. They were cutting timber there when we were there. I took two samples. I marked those samples 4 and 5 I think. I
703 turned them over to Prof. Comstock. No more samples. There is grass in Rock Creek Canon. It is a ridgy, mountainous country. It had grass and it has vegetation, such things as grow in the mountains. I saw a very few cattle grazing in there. There was a few cattle down at the

lower mill site. I think we found—I think probably there may have been 10 or 15 head and may be more. But not very many at the upper mill setting. We found 2 head. 704
Up on the main divide we saw a good deal more cattle, wild cattle, 15 or 20 of them, and there was 3 or 4,000 sheep there at the upper mill setting. They were camped there with their sheep, and had their sheep over there, and they were grazing on the ground. This was '94 I think; 4 years ago about. Those sheep were there when we went, and they were there when we left. Mr. Shaw, the owner of the sheep, said he had about 3800 sheep there.

I didn't find any valuable mineral deposits in Rock 705
Creek Canon. I was looking for them.

CROSS-EXAMINATION.

By Mr. Herring:

I didn't say I prospected in that canon as late as 7 o'clock in the day. I didn't say I worked up to 7 o'clock. I said we started in the morning about 6 o'clock; that was our orders. Then in the afternoon up to 7 o'clock. Sometimes it was dusk when we got back to camp. I said 706
we got back from 4 to 7 o'clock. I didn't have no lantern with me prospecting. It is pretty dark in that canon at seven o'clock; we got home two or three nights after dark too; we had to walk. We didn't look for grass or sheep; I was looking for mines, I was sampling in there.

Flipper, Mr. Connor and I were in there. We were having a pretty fair time while we were in there. A pretty good time. It was in May, I think it was. I call it a nice little trip there; you have been there and know the 707
country as well as I do. I killed a nice little buck up there. We had a nice dinner. I was the cook. It didn't take very long to cook that deer; it don't take a miner long to cook a piece of meat. I was not the cook of the

outfit; I volunteered my services. I did the most of the cooking myself. That did not take a good deal of my
708 time. It don't take you long to boil a piece of meat or fry it; you can do it very quick. I have been a long time looking for mineral in this country. I have made a good many locations. Well, some made on my judgment, and some I located for other people. Some I paid what they had done; I paid for the recording, as anybody else. On my own judgment; I have located many a one. I have some good mines in my locations; that turned out to be good mines.

Charles R. Hood, a witness worn for the plaintiff, in
709 rebuttal, testified as follows:

By Mr. Morrison:

My full name is Charles R. Hood. I reside here. I have been at Rock Creek. I was there in April, 1890. I was there with E. A. Bowman, special agent of the General Land Office. I saw Daniel Ross there, and others I didn't learn their names; but they were men working there in that canon at that time. Mr. Ross was there at work. I heard a conversation between Mr. Ross and Mr. Bowman. I can't remember all that was said in that conversation.
710 Mr. Bowman, I remember, asked Mr. Ross if he considered that mineral land he was cutting his timber from, and Mr. Ross replied that he didn't know whether it was mineral land or not. He says: "There has been considerable prospecting done in this section of the country." He says thought, that "I understood that I had a right to cut timber for mining purposes anyway." He didn't say anything about where. We were called there to investigate that section of the country where he was cutting; that is what he had reference to.

711 CROSS-EXAMINATION.

By Col. Herring:

I have been here about 10 years; I came from California here. I have not been living in California since

the last trial. I was in California since the last trial. I was in California probably 18 months since. I am living here now. 712

It was in the day time that I had this talk with Ross. It was at his saw-mill. It was at the upper setting, I believe. I know there was one below where we were at. There had been a setting below where we were at, at that time. I don't know there was one above there, but I know there was at the second setting. I don't know there was one above there. I saw two settings; there were two I saw. I didn't see three settings. I don't know there was three.

713

Mr. Bennett: We offer now the testimony of

E. A. Bowman, from the transcript made by Mr. Tichenor.

By Mr. Bennett: We offer in evidence the subpoena issued out of the District Court of the First Judicial District of the Territory of Arizona, and the return of the U. S. Marshal on the same, "I hereby certify that the within named parties are not to be found within my district, but are said to be outside of this Territory. Signed William M. Griffith, United States Marshal for the District 714 of Arizona.

"E. A. Bowman, a witness sworn for the plaintiff, "testified:

"I had a conversation with Daniel D. Ross. I asked "Mr. Ross if he thought it was mineral land he was on, "and my recollection is, that he said there had been no "valuable mineral found in that vicinity, and my recollec- "tion is, that he didn't claim that it was mineral. He "said he thought he had a right to cut timber for agricul- "tural and mining purposes generally; that is all he said. 715 "Mr. Hood and Mr. Ellinwood were with me at that time. "Mr. Hood is a gentleman here in Tucson. His name is "C. R. Hood. He was designated as an assistant and he

"went with me on that examination. I went there to in-
"vestigate this timber depredation, and the character of
716 "the land. I told him I didn't come for the purpose of
"questioning him, but simply I just wanted to know how
"much timber he had sold. I asked him whether or not
"there had been any valuable minerals found in that vicin-
"ity, and he said, No, not to any extent. He said a few
"specimens had been found. That is my remembrance. I
"had a conversation with him as to his right to cut on
"the land. I told him I didn't think he had a right to
"cut it. He said he thought he had a right to cut it for
"domestic and mining purposes, anywhere on public lands.
717 "That is what he said, and I so reported it.

"I didn't look at the land particularly with regard to
"its value for agricultural or other purposes. The north
"side of the hills seemed to be rough, but the southwest
"side seemed to be rather smooth. Grass grew there on
"the mountain in this vicinity; and I saw some cattle
"there. I don't remember the number of cattle now. That
"was in April.

Mr. Bennett (reads):

718 "H. O. Flipper, a witness sworn for the plaintiff, tes-
"tified as follows:

"I am a civil engineer by profession. I was taught
"geology and mineralogy at the military academy where
"I was graduated. At West Point, State of New York.
"Those branches were taught there, and I have a diploma
"for proficiency in them. I have examined and reported
"on mines during the last 10 or 12 years, and have done
"some prospecting myself. I have been in Rock Creek
"Canon. I reached there the afternoon of May 11th, 1894.
719 "I went with Mr. Connor, Mr. Ellinwood and Charles
"Roller. We were there until the 20th of May. That
"would be 9 days. Those 9 days we were examining the
"section of the country immediately adjoining Rock Creek,
"as to the mineral character and the timber cut there,

"and Rock Creek itself. All of the time except about one "day while we were there, was spent in this examination. "We were doing this to determine the mineral character 720
"of that section of the country. I don't know for what "purposes, or I did not at that time.

"We reached the west location of the saw-mill on the "afternoon of the 11th of May, and on the morning of the "12th of May, went on down Rock Creek about a quarter "of a mile, and then went northerly through a gulch into "Rock Creek, examining for mineral. In the bottom of "the gulch and about a quarter of a mile from Rock "Creek we found float limestone and float quartz. Some 721
"of it was with iron. We examined it very carefully, and "we first concluded it had come from a ledge, and upon "the west side of this gulch upon the slope, we found a "limestone ledge running north, or nearly north and "south. In this limestone ledge were perfect globules of "white quartz. We examined it and we came to the con- "clusion that it was barren, and took no sample. We con- "tinued on up the gulch until we came to a divide, the "summit, where to the west it went towards Rock Creek. "And we went along the summit and traveled backwards "and forwards. We were afoot and we examined the 722
"country all over. We did not go into Pinery Canon. We "went to the divide between Pinery and the other; we "didn't go into Pinery Canon.

"Mr. Connor and Mr. Ellinwood and myself were the "first persons that made these explorations. On the first "day in the afternoon we found a large blow-out of por- "phyry rock heavily impregnated with iron, and that blow- "out is about a mile or nearly, due north of the middle "location of Ross's mill. It was late in the afternoon and 723
"we made no examination of it intending to return to it "later. It was on the 12th day of May. Now let me see "how far I walked south. On the next day we examined a "corresponding section of the country on the south side of

"Rock Creek. On the second day the whole of this inves-
"tigation. The greatest length was from 8 to 10 miles
724 "from east to west, starting from Fitch's ranch, and about
"4 or 5 miles north and south. We didn't travel over all
"of the whole parallelogram, but from adjacent to Rock
"Creek. We were afoot during the whole 9 days. We
"worked the whole time from about 6 until it was too
"dark to see anything. We found no indication of min-
"eral at all, except the limestone ledge I have spoken of on
"this blow-out of porphyry heavily impregnated with iron
"on the north side of Rock Creek, up the right fork of
"Rock Creek. That is the fork that goes in from the
725 "southeast. There is a little ways, probably three hundred
"yards from the third location of a mill, there is a facing
"for a tunnel. It is merely started enough to see what it
"is. At that time it appeared to be old workings; it had
"not been done recently at the time we were there. I
"was there in May, '94. I know about the Philadelphia
"Mine. That was located about two miles south of the
"first location of the mill. It is an outcrop of quartz that
"shows on the surface for two or three hundred yards
"and starting with a shaft made there, from one to 2 feet
726 "in depth, and over near the opening is a monument. I
"should judge the monument is built of stone taken out
"of the bank; there was probably two or three fissures of
"quartz that was impregnated with iron. Mr. Ellinwood
"and myself took samples at the big blow-out of porphyry
"and two at the Philadelphia, one at the shaft, and one
"farther along on the ledge. They were taken charge of
"by Mr. Ellinwood and brought up here for assaying. I
"saw the returns from the assay; I saw a copy of the
"report. It is rock that indicates the presence of mineral,
"but in examining it, I came to the conclusion there was
727 "no mineral in it. As to the whole of the country I ex-
"amined, my conclusion is that it is not mineral land. On
"the San Simon side we didn't go into the valley, but to
"the summit on that side. We got over the rim of the

"mountains. Starting from Fitch's garden, running east-
"erly and going up the ridges of both sides of the canon,
"there is good Gramma Grass, as good grass as anywhere. 728
"It was becoming abundant at the time we went in there
"and as you come up the mountain, the grass gets scarce.
"Just along the creek it grows without much in it, but
"where the pine timber is, then the grass is better, and
"as you get on the mountain, there is grass on top there,
"of what we call the main ridge. After we get up on the
"summit.

Col. Herring: Objection.

By Mr. Bennett: The question is, Q. After you get
"on the summit. He says after you get on the summit 729
"you can see two or three miles in a southeasterly direc-
"tion.

By the Court: The objection is sustained.

By the Court: That portion of this testimony which indicates that the witness is referring to the land on the other side of the rim or the ridge as he described it, is hardly relevant.

By Mr. Morrison: Exception.

730

Witness: "As you go to the head of Rock Creek be-
"fore you get to the summit, and instead of going to the
"east, turn square to the north, and that brings you to
"a divide. There is a thick growth of aspen, and on the
"south edge of this, there are some pine trees; but as you
"would go north you would go through a thick growth of
"aspen.

By Col. Herring: Objection.

By the Court: Objection sustained.

731

By Mr. Morrison: Exception.

Witness: "In Rock Creek and the immediate vicinity
"we saw a number of sheep, herded by two Mexicans. I

"estimate there were between three and four thousand
"sheep. There was quite a large bunch of them.
732

"CROSS-EXAMINATION.

"By Col. Herring:

"We met those sheep every day we were there. But
"the first day we came up the right branch of Rock Creek
"about between a half a mile and a mile up, and when we
"got to a point and turned south and went on the same
"mountain, those sheep had just come over the summit
"when we met them, and they continued on down in the
733 "canon, and as I recollect, they went down on Rock Creek.
"There was other kind of stock in Rock Creek. There
"was no other field there than where those lilies were
"growing, except there was timber on both sides of it.

"My recollection is that there wasn't any grass at all
"growing where the lilies were growing. The cattle I saw
"were 10 or 12 there. I only saw that there were 10 or
"12 of them. They were exceedingly wild. I saw other
"cattle in there. The night we reached the first location
"of a mill, there is a little fence around a house on the
734 "north side of the road, that we camped in, and there
"some cattle got in there during the night. Three or four
"of those; only a few of them. I did not assist in count-
"ing the stumps; they were not counted at the time I was
"there. Where we first struck that ledge of limestone it
"was possibly a foot wide, and over at the other places it
"was probably 10 or 12 feet. Its extension in length
"was about 200 yards. In this it was impregnated with
"iron. We did not take any samples of the iron, but I
"examined it. The presence of iron in limestone is one
735 "of the indications of the presence of other mineral. It is
"usually so in southern Arizona. The presence of iron in
"limestone justifies prospecting for other minerals. I took
"samples of the quartz ledges we saw. I passed them over
"to Mr. Ellinwood. Two samples were taken. I do not

"recollect now how large those samples were; probably
"two or three pounds in each one. One sample was taken
"in this shaft that was started, and another one probably 736
"100 yards southerly from there on the surface of the
"ledge. On top of the ground, right in the outcrop. I did
"not take any other samples from any other quartz there.
"I did not take any other limestone or quartz from any
"other place at all. I saw porphyry in a number of
"places, stained with iron, besides the big blow-out I spoke
"of. The presence of iron in porphyry would indicate
"other minerals. That would be so as a rule in explora-
"tions. I made no examination of the deposit in the sand
"or the gravel along Rock Creek. I did no panning what- 737
"ever. If gold were found in panning in Rock Creek and
"its branches, so far as that was any indication, I would
"infer that gold must have come from some point from
"which it had been in Rock Creek Canon. Well, points;
"different places.

"I took a geological course of studies. In mineral
"regions it is often a fact that there are many ledges that
"are covered and not visible any more, coming from the
"ground.

738

"RE-DIRECT EXAMINATION.

"By Mr. Smith:

"It is a fact that there are many things under the
"ground, we can't see, beside ledges. It is also true that
"often when they go down with development work, it
"often doesn't pay to work. It is also a fact that lime
"impregnated with iron stains often has not mineral.
"That is often true of quarzite. In my opinion the find- 739
"ing of iron stains is not an absolute indication of mineral,
"but where you find iron, you expect to find mineral; it is
"an indication. It is not the fact that where you expect
"to find mineral you would find nothing. We determine

"that by further prospecting. In many cases it requires
"an assay to determine. Iron is a mineral and so is rock.
740 "I should think theory and practice should go together
"in mining. The practical miner who has only mined in
"one district, only knows that one district, and the the-
"oretical man without any experience is also equally ignor-
"ant. The best expert is the pick and drill.

The Court: Gentlemen of the jury, the noon hour has arrived and we will take a recess. You will bear in mind the admonition previously given not to talk about this case among yourselves or with any other person, and
741 not to form or express an opinion but hold your judgment in abeyance until the case is finally submitted to you.

You will return here at two o'clock.

Recess until 2 o'clock P. M.

Tucson, Ariz., June 4th, 1898

2 P. M

742 Jury called. All answered to their names.

The Court: Proceed.

Mr. Bennett: (Resumes the reading of the evidence from the transcript of the previous trial.)

"The testimony of

Samuel A. Hawk, as transcribed by B. W. Tichenor, the stenographer at the former trial." But we will first offer in evidence the subpoena for Samuel A.
743 Hawk and the return of the marshal on the same that he could not be found.

"Samuel A. Hawk, recalled on behalf of the plaintiff "in rebuttal, testifies as follows:

"DIRECT EXAMINATION.

"By Mr. Smith: 744

"I know Rock Creek Canon. I first saw it the 13th "of November, 1890. I went up to examine the trespass "or the place of the trespass in that canon—the govern- "ment land in that canon. At that time I was special "agent of the General Land Office—in 1890. I was in the "canon six days nearly. I was examining the character of "the ground and going over the territory upon which the "timber had been cut. And the ground of the trespass. I "have been in the canon testified to and there at a place "called Turkey Pen Canon we found one monument there. 745
"and the notice in that monument read that it was the "Pennsylvania mine. Then we passed over into Rock "Creek Canon and stayed all night at Mr. Fitch's. We "went about a mile and came back to Mr. Fitch's that "night. I will say that I called at Mr. Ross's at his mill "on the evening of the 13th of November. The Philadel- "phia—I mean the Philadelphia mine; that was the only "monument I saw and the only working. There was "scarcely any excavation there; there was just a face. "There was a monument built of the country rock and 746
"just a few shovels full of dirt thrown out probably, on the "lower side of the mountain which was on the side, just "probably 6 or 8 inches deep and of course throwed back, "which might have been two or three feet in depth. There "was only a very little excavation done. There was a pic- "ture taken of that place. I can identify the picture.

Mr. Ellinwood: We offer that photograph in evidence.

"This is the picture taken and shows the excavation "of the Philadelphia mine. That shows the amount of "the development. That is the only development that I 747
"saw in my whole investigation over there.

Photograph admitted in evidence and marked Plaintiff's Ex. 2.

"I was over there first with Mr. Douglas Snider, and
"the second trip with Mr. Litzky. I was there two trips.
748 "I was nearly six days in the investigation of that country.
"The next year I was at Mr. Ross's. I had a conversation
"there with him, about the character of this land. I
"called on Mr. Ross, and the conversation I had with him
"I have related before, concerning the amount of timber,
"and I asked him if he had any mines, or if there were
"any mines, or if he knew of any mining on the lands
"there, and he said he did not, that it was no mineral land;
"that there was some man from Bisbee, my recollection is,
"that he said Goodel, or some such a name as that, with
749 "men was up there exploring that part of the Territory
"for mineral and had showed him some samples that he
"said were good. I asked him if he had any of those
"samples there and he said that he had not, and that he
"did not know anything about it, and he was not a judge.
"We asked Mr. Ross to go with Mr. Snider. I didn't go
"with him, but I asked him to go with Mr. Snider; that
"it was not the purpose of the government to take any
"action against him if he had any right to cut the tim-
"ber. He went with Mr. Snider. Of personal knowledge
750 "I know no more of that whatever. I went over the divide
"testified to by Mr. Montgomery. That was a well tim-
"bered country with fairly good grass; of course I have
"known better grass, and I have seen worse. The grass
"was all over the mountains more or less, but particularly
"good right northeast of the mill; that was a good piece of
"grass. There is a large trough of flowing water at the
"mill. There were cattle grazing on the mountain at the
"time. "I didn't see any other stock. I have had experi-
"ence during all my term of office in examining lands
"both of mineral locations on agricultural lands, and agri-
751 "cultural entries on mineral lands; that is the extent of
"my investigation. Where a conflict arose, I have exam-
"ined frequently as to the character of the land, whether
"it was mineral or agricultural.

"I was in the service in these investigations at that
"time 2 years, and since that, two terms, four years nearly.
752

"CROSS-EXAMINATION.

"By Col. Herring:

"We went into Rock Creek Canon by Smith's ranch
"from Turkey Pen Canon, up past Fitch's ranch. I
"stopped at Fitch's ranch, over night. I was there three
"or four times. I was there over night the first time. Mr.
"Snider was with me. I think the days we were in the
"canon and neighborhood during that trip were the 13th,
"14th and 15th. I think that those were the days we were 753
"there. There was no snow there when we went in: it
"snowed some the 14th, I believe—the 14th or 15th I
"wouldn't be positive which. There was snow falling
"that day. My recollection is that it didn't remain on the
"ground to any extent. It ceased snowing while I was
"there. After it ceased snowing, I shouldn't think it was
"more than an inch; the ground was hardly covered at
"all. It is only my recollection, and if Mr. Snider should
"say it was 3 inches, I wouldn't say that he was mistaken.
"It may have been 3 inches in some places, but my recol- 754
"lection is that the ground was scarcely covered. I think
"it was the 14th. I think it was before we left there that
"night. It snowed in the afternoon and we left the next
"morning. I was not making any examinations
"the afternoon it snowed in relation to grass, or any ex-
"amination of the land. Mr. Snider and Mr. Ross were
"out that day. I was making no investigation. I made
"no special examination as to the grass. My general obser-
"vation in my travels there was what I am
"speaking of. I didn't go ont on any special 755
"day to make any observation as to the grass, before
"it was right before me and I could see it. The statements
"I have made here today are from that general investiga-
"tion. The best grass was on the northeast of Ross' mill

"up the divide and over the apex of the mountain. I
"do not know to what degree that side of the canyon is
756 "precipitous, but that side is rather steep. Very precipi-
"tous, and rugged and broken. Ther is some timber on
"that steep, rugged broken side, but not the best timber.
"It is pine timber. I was on all sides of that mountain
"myself. I took a horse up that side of the mountain. I
"rode up. In riding up I picked out the most accessible
"pathway for the horse to travel. That was in the de-
"pression of the canon. I can't recollect every spot, but
"there was more or less grass all over the mountain when
"I was there. I would not say positively as to any special
757 "depression. I was speaking of the general character of
"the mountain there. I could not confine it to any one
"spot. This was in November. There was grass among
"the pine and the cattle were grazing on it. I should say
"so far as grazing purposes are concerned, the grass grew
"there in appreciable quantities; not for hay perhaps, but
"for grazing purposes. From the mill setting we went
"south. I rode up all these canons. I rode up
"the first one we have been talking about. The canon
"did not run directly north and south, southeast I think.
758 "In going over there we didn't go clear over the mountain
"going south. I went clear to the top of the mountain
"and I say a mile and a half or two miles. When I left
"the mill I left the canyon to go to the right of it on the
"mountain. The two canons forked at the mill but the
"Rock Creek Canon is one canon. I claim all of that is
"the same canon but different forks. Different forks of
"the same canon. It was the fork of the canon I rode up.
"We didn't go over the mountain going to the right; we
"just went on the mountain on the apex of the hill. We
759 "didn't go over the mountain at all; when we went over
"the mountain, it was to the left and going northeast. I
"did not go over the mountain from the fork of that canon
"to the right of that fork. I don't know whether there
"was any grass there or not; I only know of what I am

"speaking. The first fork continues to the top of the moun-
"tain, and when you get to the top of the mountain you
"are out of the fork. 760

"I examined the country on the southeast of the fork
"of that canon to the extent that you can see the whole
"side of the mountain all the way; that is, all the way up.
"That is, all that fork. I cannot see the top of the moun-
"tain at that fork; but when we went up on the hill, we
"went clear across the top of the mountain where Mr.
"Montgomery explained to you that I got away from him.
"We went over the mountain, I don't know how far; I
"think it was a good ways, but I couldn't tell in miles. I 761
"went clear around right east of the mill, that is, I did; I
"couldn't say which way Mr. Montgomery came down, for
"I got there before he did. When I came down to the left
"of the mill, I came down above the mill. I passed over
"the plateau and came down some trail. Come down on
"same trail you come down from Gayleyville. I was on
"the plateau that day. Understand me, this was when Mr.
"Montgomery was with me when I was up there. When
"Mr. Snider was there I wasn't there then. When Mr.
"Montgomery was with me I found some grass on the 762
"plateau. At that time we did not see a single head of
"stock on that plateau; we did right under the plateau. I
"made no special examination for grass on the plateau,
"only what I could see. I saw grass there. I didn't ex-
"amine the character of the grass. I could only say that
"it was grass that the stock under the plateau were feed-
"ing on. There were some trees growing on the plateau.
"Fine trees. They were not so thick on the plateau as on
"other places. There was not a spring of water or a well of
"water on that plateau, that I recollect. I didn't see any 763
"stone wall up there on that plateau, and a stone spring.
"I didn't notice any water on the plateau. I could not see
"any cattle on top of the plateau.. There were a number
"of pine trees on that plateau; but not so thick in there.

"We could see the sky above them. The land wasn't en-
"tirely covered with pine needles and pine cones from the
764 "pine trees. I didn't say 'entirely,' but 'largely' covered.
"There were some on the ground. They were some pine
"needles and cones on that plateau under the pine trees
"in November, but the ground was not entirely covered
"with them. I didn't examine the character of the grass.
"The grass was very visible there, but was not every
"place, and the needles and cones you speak of were not
"so thick that they could cover the grass. I couldn't tell
"you how much grass they did cover. I didn't make any
"average of that. While I was up there I did not go to
765 "any other plateau where there was grass. I did not go
"to any other plateau than the one we have just been
"talking about. I saw no other plateau than the one we
"have been talking about; for I made no investigation
"outside of that and the territory between there and
"Gayleyville; I didn't go over there to the other canons at
"all. The word pine is b o w—it doesn't make any con-
"nection. There were cones and needles there in consid-
"erable quantities, in accordance with the number of trees.
"I came down from the mountain that night from this
766 "plateau. I was on the plateau that day I would say
"from half past one to 3 or 4. I was on that part alone.
"I had a horse and camera with me, and Montgomery was
"in some other part of the mountain, I don't know where;
"and I was alone at that time. I same along slow; I didn't
"make any stop for any length of time but made a gener-
"al observation quite hurriedly. When I passed that plat-
"eau and came down from the mountain above the mill I
"passed through and around that plateau and came down
"the mountain. I made an examination of all of the coun-
"try. It is a very steep grade from the plateau by the
767 "direction I came down the mountain. I don't know that
"my attention on that grade was more directed to my
"horse that to anything else, if you could see the trail well
"and know that your horse is a good, sure-footed one you

"needn't pay special attention to that; the horse will take
"care of that himself. My attention was not directed more
"to my horse in getting down off the mountain in safety 768
"to myself than to anything else. It would be for someone
"else to say whether I was a good horseman; I don't know.
"I have been raised with horses all my life. I came all the
"way down the steep grade on a trail. My examination of
"the grass extended as far as I could see. I did not leave
"the trail to ride over the mountain any distance; but
"you could see both sides of the mountain from the trail;
"I mean both sides of the canon—Rock Creek Canon on
"the trail. Most of the way that trail is on the side of the
"mountain. That is the grass I saw at that time, at that 769
"place. The sides of the canon there on that trail are com-
"posed of slides of rock and earth, and trees, and grass,
"and pine cones and pine needles. There were cones and
"needles through the grass. They were there in consid-
"erable quantities in accordance with the number of trees.
"Some of the trees had been cut on that trail. Very few
"had been cut at that time. There were a great many trees
"growing on the sides of the mountain along that trail.
"Pine trees. After the first day, Mr. Snider and Mr. Ross
"went over toward the Dunn Mine and I remained at the 770
"mill and walked down the canon a ways. I didn't walk
"far down the canon; 2 miles that day. I remained in the
"canon that day. I didn't go on the other side of the
"mountain that day; for you can see both sides of the
"mountain from the road where Mr. Ross hauled the tim-
"ber out as you passed up and down the road. You could
"see both sides of the canon. You can see the apex of
"the mountain on the right, as far as the sky line, and you
"can see on the left as far as the sky line. For two miles
"below that upper mill setting there are slides of rock. 771
"There were not a great many pine cones and needles on
"the sides of that canon, for the timber was cut. The tim-
"ber had been cut down now to where the second mill set-
"ting was. The greater part of the timber was cut about

"2 miles down from the upper mill setting. There were a
"few pine trees not cut on the sides. But the better part
772 "of the timber had been cut. That is where I saw the
"grass. The grass was not where the rock was. There
"was some rock on both sides. In many places the sides
"were extremely rough and rugged but where there was
"soil there was grass. I made no examination from the top
"of the mountain on the sides of that canon for those two
"miles. The first trip we came down the canon; clear
"down. My recollection is that we came out that evening
"late. We came down and made an examination as we
"came down; we came down slowly. Mr. Snider was out
773 "of the wagon part of the time. I came down in the wagon
"at that time. I did not remain in the wagon all the
"time. I was out of the wagon frequently, but as to how
"long at each time I didn't notice and I can't tell you.
"When I got out of the wagon I did not go clear on top
"of the mountain. I remained in the wagon. That was
"the 22nd. No one else was with me at that time. We
"went in the same way. And went on to the mill. I rode
"up the canon and Mr. Montgomery walked. I rode on a
"wagon. We got out at Fitch's ranch. We did not stop
774 "there this trip; we went right on to the mill. It was in
"the afternoon of that day that we got to the mill; I for-
"get exactly what time it was, but it was in the afternoon.
"I remained there all afternoon. The next day I went from
"there in the morning; that is the trip I have described.
"I have also described all the trip I made on the first visit.
"One of those days I described was the first day. The
"next day after I got in there I went over the trail to Gay-
"leyville. The part of the ground that I had been over be-
"fore was only that part of the trail where I came down
"off the mountain. I went up that same way to the plat-
775 "eau. I visited east from that plateau. When I came back,
"I came right up Turkey Creek and right up the trail, the
"same way I had gone in. After that we left the mill. We
"left the mill early in the morning of the fourth day and

"came down to Mr. Fitch's ranch again, and Mr. Mont-
"gomery followed below. He made a plat of Fitch's ranch
"there where he had some corn and vegetables, and we 776
"went over into Turkey Pen Canon. When we came back
"from Mr. Fitch's we kept on the road. When we came back
"we came down the canon. We got out on the grade. I
"didn't go on top of the mountain. In Turkey Pen Canon
"we made an examination of that Philadelphia Mine.
"That was the second time and we took a picture at that
"time. Then we went out of the canon, but you can see
"all sides of the mountain from the road. Excuse me; you
"can see all sides of the canon. We went out of the can-
"on. I have not been there since. That is all I know 777
"about the grass.

RE-DIRECT EXAMINATION.

By Mr. Smith.

"At the time the picture was taken, I was standing
"with my right foot in the excavation of the mine; the
"only digging there was there. That shows the extent of
"the excavation. I am in doubt as to how far from the
"upper mill setting the McKinley ranch was, or Gayley- 778
"ville as given by the map—it was given in court here as
"8 miles. The McKinley ranch it was 10 miles. Mr.
"Montgomery took the horse and I walked back, and he
"got me on top of the mountain and I rode from the top
"of the mountain to the mill.

(From the transcript of the former trial.)

Mr. Ellinwood:

"Theodore Comstock, a witness sworn for plaintiff, testified:"

779

"(A paper handed the witness.) I can't see the date
"here. Mr. Ellinwood brought me some samples and I
"thought it was about that time. I am not certain how
"many samples he gave me, but I think there were two or

"three. I looked them over and turned them over to my "assistant for examination. Mr. Goodlow was my assist-
780 "ant. They were given to me for a determination as to "what they were and what minerals if any. As far as I "remember Mr. Ellinwood never brought me any "other. He may possibly have given me some subsequent-"ly, but the only ones I ever reported on were these. I am "not positive that I turned all these samples over to Mr. "Goodlow, but I think I did. Sometimes I turned them "over to Goodlow and sometimes I examined them my-"self and I reported on them. These particular samples "I turned over some of them and possibly all of them to
781 "Goodlow and they were passed through the usual meth-"od through the laboratory. I afterwards received the re-"port. I gave him the report (Ellinwood), but the act-"ual assay or test was made by Prof. Goodlow. I think it "was.

CROSS EXAMINATION.

By Mr. Herring.

"I know what Prof. Goodlow did with that sam-
782 "ple. I saw him doing something with it. He made a "blow-pipe test to determine the minerals. That he re-"ported to me. I am testifying from memory and I have "not my records, but I remember he made the test.

Testimony from former trial read by Mr. Ellinwood:

"Mr. Goodlow, a witness sworn for plaintiffs, testified "as follows: (in rebuttal.)

DIRECT EXAMINATION.

783 By Mr. Smith:

"I am engaged in teaching assaying and mineralogy "and making public assays for the determining minerals "in place. I have been employed in the University in this

"capacity I speak of, for three years and six months and
"before that I attended a university where I learned that.
"I believe myself to be a practical assayer. I had samples 784
"delivered to me by the Clerk of this Court within the last
"few days. The gentleman I see over there now at the
"Clerk's desk gave them to me. I have with me the cer-
"tificate of assay which contains the result of those as-
"says. I have tabulated it so I can take them in their order.
"(Producing paper.) Sample No. 12. Here is weighs 1317
"grains. Troy ounces. Gold per ton, none; Gold, value
"per ton, not any; Silver; Troy ounces, per ton, not any.
"Now sample marked No. 16, weighs 490 grains; Gold.
"Troy ounces per ton none—trace. I have specified 785
" 'trace' here by less than 1-100 of an ounce per ton. I
"made an assay. I heard Mr. Comstock's testimony here
"some time this last year. I have a memoranda here from
"which I can tell. I made a test of those ores. A test was
"made of those ores, and I have a memorandum that was
"delivered to me by Prof. Comstock of the test which was
"made, and the test to be made was what he termed a
"———test, which showed no result for gold or silver.

CROSS EXAMINATION.

786

By Col. Herring:

"I did not make any assays for any other metals in
"those samples submitted to me, other than for gold and
"silver. I received those instructions by the understanding;
"it was not written, but I understood that to be the case.
"I got the instructions to get the samples, from Mr. Ellin-
"wood. The qualitative test I made has been given. It
"was a simple qualitative examination with nitric acid, and
"cupelled it, and with hydrochloric acid; that was all, and
"he precipitated it as chlorides. For the gold, it was hy- 787
"drochloric acid heated, and then in the solution a little
"chloride of tin and zinc chlorids. I made no examination
"for lead. As I understood, I was to take one half of the
"samples and the rest were delivered, I understood, to

"Judge Herring only yesterday afternoon, after the ad-
"journment of court.

788 Douglass Snider, a witness sworn for the plaintiff in rebuttal, testified as follows:

By Mr. Morrison:

I live in Pima County. I have lived in that county eighteen years. My business is mining. I have been engaged in mining a good share of the time for the last 30 years. I have been mining more or less all the time since I have been in Arizona, principally in Pima County. I am mining at present, about 30 miles south of here, a little
789 west of south, in the Sierrita mountains. Working for myself. I have been in Rock Canon in Cochise County, I was there in November of 1890. Mr. Sam Hawk, a special agent of the Land Department was with me. I went down there with Hawk to look over the country and to examine the mineral character of it. I was a little less than two days and a half in Rock Canon and vicinity. We first entered Rock Canon a little after noon; possibly 1 or 2 o'clock. We first entered Rock Creek Canon where the grade comes down into the canon, that crosses over from
790 Turkey Pen. That point is below what is called the lower setting, I think. Below the lower mill setting. Fitch's place. We drove in there and examined the country as we drove along. We didn't get out; that is, at the time we were going in there at the first.

I think there was some timber cut on the road that we came into Rock Canon on.

At Fitch's place we made camp and remained there that night; that afternoon and that night. That afternoon we just examined it around in the neighborhood of the
791 camp there. I remember looking out over the breaks and the wash for float and one thing and other. I found no valuable mineral deposits that afternoon in Rock Canon in my examination. I was examining the country to see if I could find mineral. I did not find any. The next morning after

breakfast we hitched up and drove up to where the mill was setting at that time. I should judge that point was 2 miles, probably more or less from the place where we 792
camped. We went up the road in a wagon. We simply examined the ground along. A portion of the way the road is graded and we examined the cuts and grades as we went along. Examined it for mineral. I found nothing that denoted mineral. We walked our horses along up, and I suppose we might have been possibly an hour in getting to Ross' upper mill setting. When we got there, the mill was running and Mr. Ross was there, and his crew, Daniel D. Ross. We put out our horses there, and had a conversation with Mr. Ross, and started out into the hills 793
to examine the ground. I started out into the hills, and the others also. Mr. Ross went with me that morning a ways. Mr. Ross and Mr. Hawk also at first. Ross and I first went up the left hand track. There where the mill sets, the canon forks to the right and left, probably to the northwest and southwest. We first went up to the left hand fork along a road or tramway that had been built. We went possibly half a mile. We had spoken to Ross about it and asked him if he knew where there was any mineral, and I think both of us spoke to him. And I told him if 794
he knew where there was mineral, it would save some trouble if we could find it. I told him if he would show me the mineral I would sample it and divide the samples with him. Of course he knew what we came for. He told us where he thought there was mineral and said he would go and show it to us. And we started off. We went possibly half a mile from the upper mill setting, on the fork. Ross showed me a place where there was some rock that was stained up there which I took a sample of. There was no work at that place. A cut had been made there which 795
he showed us by a tramway or drive way, I don't know the proper term for it, and in doing that, it had exposed that particular rock that he thought might have mineral in it. That rock was right at the edge of this cut. It had been

cut in order to level it probably 2 feet or something like that, or three feet; between 2 and 3 feet. I made my
796 sample from the place where this cut was, from the right hand side down at the bottom of the cut. It was not a cut. For instance, a point had come down abrupt and had been cut out some, and in cutting out, it had exposed the rock. Ross was there when I took this sample; I took probably 4 or 5 pounds. This rock showed no valuable mineral deposit that I could see with my eye or my glass. It was stained up, it had iron stain in it. The sample I put in a sack. The sack was marked as taken from the left hand fork of the canon above the mill. Marked as taken out of the left hand canon, left hand fork of the canon. Afterwards the sacks were numbered and the number 6 was
797 placed to it. I brought that here to Tucson together with other samples. After I came to Tucson I turned it over to Mr. E. L. Wetmore, the assayer here in town, with instructions to assay it. I next came back to the mill and from there I went up to the right hand fork which would be the——and started down west, which would be the south bank of the canon, the southern side of the canon, Rock Creek Canon. I did not do anything at the forks that time, but later. I put in the forenoon then until 12 o'clock in prospecting along through the country where
798 the timber was cut off. On the south side of Rock Creek Canon, and principally in examining where the rock was uncovered or barren of earth, and searching down the gulches and canons that cut through the side or from the side to the main canon. I spent my time that way until noon. I found no valuable mineral deposits. I took no samples from that side of the canon that morning, but in the afternoon I took a sample from the right hand fork of the canon along the
799 tramway where they were at that time working. The right-hand fork going up from the mill. It was on the south side of the tramway. The tramway made a little bend there when you got up to the upper part of it, and in drag-

ging the logs down, in swamping them down the skidways they had rooted up the earth there some and had exposed some rock and torn some rock off that also had some iron 800
stain on it. That was, I suppose, between half and three-quarters of a mile from the upper mill setting. On the south side as you go up the canon you are traveling to the east, and where the mill sets the canon forks. The one took, I should think, a northwesterly direction, and the other a southeasterly direction, and at that time the tramway was up that canon and they were working up there. Cutting timber. At that time I took a sample of about five pounds. The sample was really a porphyry and had some iron stains in it. I could not tell by looking at the 801
rock whether it had any valuable mineral deposit; nor was I thoroughly satisfied that it did not contain mineral, and for that reason I took the sample. I did with sample as I did with the other; put it in a sack separately and brought it to town and turned it over. I marked it as being taken from the right hand fork above the mill, along the tramway. I gave it number 7 in numbering my sacks. And I brought that sack and that sample in and delivered it to Wetmore, as I did the other. I delivered these samples to Wetmore for assay. Late that evning Mr. Ross 802
went with me down the grade just below the lower mill setting, and there is quite a heavy grade cut through leading out of the canon; and there I took three samples. Ross went with me there because he thought there was mineral there, and we had asked him to show us mineral, and he took us to that spot. That is on the road leading out of the canon, as you go out of the canon over the Divide into Turkey Pen Canon. It was only a short distance from the lower mill setting; possibly an eighth or a quarter of a mile, something like that, on the roadway. The roadway
as it leads out of the canon has got a heavy grade, and in 803
making that grade they cut deeply into the rock on the upper side especially, in order to get the grade to get out of the canon. I took my samples at the left of the road-

way; when getting it on the right of the roadway would be the fall. That is where the road has been cut into the
804 side of the hill; still higher up. It was cut from the hill a little and one of them was taken from that. There was porphyritic rock there with some iron stain in it; a red stain. It showed nothing that I could tell, as to valuable mineral deposits. I took from there three samples at this place along the grade; took what I made three samples of. Ross was with me at that time. I took about the same samples as the others. My sacks with the samples was shot sacks, and they would hold, I think, obout five pounds of mineral apiece, or rock. I marked the samples I took from
805 the roadway there, "3, 4, 5, on grade going out of canon." I brought those samples in with the others. Altogether I took 8 samples. I have described 5 samples thus far in testimony. I took one sample in the forks where the forks come together right at the mill, and that was a float of different characters of rock, to see if I could find anything in the float. That was right in the creek bed. I took these samples right at the junction. That is right at the upper mill setting. I took about the same sample as the other, from there. I brought that in the same as the other, and turned it over to Mr. Wetmore. I marked it. That was
806 float in country rock, and I marked it "Country rock." I gave it number 1. I marked No. 1 on a piece of paper that was put in the sack. I thought there was nothing in the second sample and that is the reason I took it; I wasn't certain. I said there was nothing in it that I could see, and that I had my doubts about it, and for that reason I took the sample. With reference to the other samples I took, it looked more like mineral; a good deal of the same character. Where there was a doubt about its being non-mineral, I took no sample, and where I had any doubts
807 and thought it might have something in it, I took a sample. Particularly wherever Ross suggested. I took a sample which was marked No. 2, down the canon below Fitch's a little ways. That was near the lower mill setting, and

that I think was lime. I couldn't tell you exactly how far it was below the lower mill setting but it possibly may have been a couple of hundred yards, or something like that. It 808
was a short distance below, not far. As you would go down the canon it was on the left hand side along the ridge where it breaks off into the canon. It was close to the bottom of the canon. There was a break there probably of— a jump-off into the bottom of the canon, of probably 8 or 10 feet, and it was in the side of that, that I took it. There was a shelving piece and it looked like it might be loose rock and had all the appearance, and was a little decomposed and I took a sample there. I marked that sample as a sample taken down the canon and marked it as No. 2 and 809
put it in the sack. I put the paper in the sack. And the sample in the sack too. I took one sample just over the summit as you come out on the grade. I am talking of the summit where the road passes over and along going out from Rock Creek Canon. That would be southwest I think, from the lower mill setting. Just over the grade from the lower mill setting, probably a quarter of a mile. I found there a little quartz stained with iron, and I took a sample of it It showed there for a very short distance in a very small seam; but it appeared to me the most favor- 810
able I had seen there and I took a sample of it which was marked as No. 8 and marked as taken— I didn't distinctly mark it as being taken about 20 feet over the summit on the grade but it was taken there. That was marked No. 8. All these samples were taken within that country where the timber was cut. In the first place my instructions, out there was to look over the country that was cut over, and I confined myself in taking samples to that country. It was within the boundaries where the timber was cut. We got into the canon about 1 or 2 o'clock in the afternoon, and the second day, beginning the day we 811
got in as the first day. The 3rd day I went with Mr. Ross north of that canon. We were in the canon a little less than two days and a half; that is, we were camped in there. The day that I went with Mr. Ross we put in the best

part of that day outside of that canon. I never found any development work or shafts or tunnels in Rock Creek Can-
812 on proper. And no mining locations. I would not lose any time prospecting in Rock Creek Canon within the area where the timber was cut over. My judgment is, that it is a non-mineral country. My judgment is that that portion of Rock Creek Canyon from which the timber was cut, does not contain any valuable mineral deposits. I took nothing with me but a prospector's pick and my glass. I walked over the country afoot. The second day we started out in the morning immediately after breakfast, and went down the canon about to the Fitch place. If you will per-
813 mit me to explain I will say that in the morning of the second day immediately after breakfast, Mr. Ross went with me and we went down the canon to the Fitch place and there struck north across the country to go to some prospects he was going to show me. We got up to Fitch's place I should think about, possibly 8 o'clock, and from that on with the exception of half an hour, say at noon, until dark, I was out in the hills or in the canon. I used all the efforts that my judgment endowed me with to discover valuable mineral deposits in Rock Creek Canon, and
814 I searched diligently during the time I was there and tried to find it. I took the very best samples that I could find in the canon according to my judgment, for to find mineral. These samples that I took, all of them had some indications of mineral by being stained and so on. And from the fact that they did have that indication, I took them. Of course where there were no indications I took no samples.

By my knowledge they compare with the balance of it, for there was nothing in any of it. I took the best. The
815 samples that I did take, the rock or samples that I did take, had some indications of mineral; the balance of the country that I did not take had no indications of mineral. I didn't take much note of whether there was any grass in

Rock Creek Canon. I recollect seeing some little grass, but I did not make much of an observation. In fact I was going along with my head down the most of the time and 816
didn't notice it. Teddy Fitch had a small garden patch there. There might have been three or four acres in it. I don't know as any of it had been plowed, I didn't notice that place to any extent as regards cultivation. The only cattle I seen there was Mr. Ross' work cattle.

CROSS EXAMINATION.

By Mr. Herring.

Samuel Hawk, special agent of the Land Department, 817
employed me to go on this mission to Rock Creek. He told me what was wanted of me. I did what he hired me to do. The first afternoon we camped at Mr. Fitch's place. Mr. Fitch's place was just after we go into the canon. We drove up to Fitch's place. We had driven that day from a ranch down in the valley; I think it belonged to some cattle company there. An abandoned ranch we camped at that night down in the valley, the Sulphur Spring Valley. (Witness refers to his memorandum): I have it here: "Camped on the night of the 12th at vacant ranch of the 818
Chiricahua Cattle Company;" "vacant house," it should be. That was not at the foot hills of the Dragoon Mountains. It was out in the valley in the open country. I had driven that day from Willcox. We got to Teddy Fitch's place somewhere about 1 or 2 o'clock I should think, as near as I can remember now. Camped there. I think Fitch was there. We took the horses out of our wagon when we got there, and remained there all night. We got our lunch before we got there. Later in the evening we prepared camp. Not right away. We had got our lunch 819
shortly before we got in there, and Mr. Hawk took care of the animals. There was no great rush about it, but I started out with my prospecting pick. The canon is rough in places. It is a good average canon, for the mountains like

you find in Southern Arizona. I have been in worse ones, and I have been in better ones a good deal. The description I have given of my prospecting in that canon is the way I generally prospect. Ross was not with me during the taking of all of these samples. He was with me for for some.

Edward L. Wetmore, a witness sworn for the plaintiff in rebuttal, and testified as follows:

By Mr. Bennett.

My name is Edward L. Wetmore. I live in the vicinity of Tucson. I have lived in Tucson since the spring of 1880. My business is assaying. I have been engaged in that business in Tucson since 1880. Two or three years previous to that time. I know a Douglass Snider who was just on the stand. I saw Mr. Douglass Snider here in Tucson about the month of November 1890. He brought me in some samples of ore for assay. There was 8 samples marked—— Sample "No. 7, right hand fork above mill along tramway." The result of that was 72-100 in silver and a trace of gold. By a trace of gold I mean something too small to weigh. 72-100 would be a little less than three-quarters of an ounce to a ton of ore, in silver. Sample No. 3, "From grade going out of Rock Creek." That is a trace of silver and a trace of gold. "From the left hand fork of the canon above the mill." That is No. 6. That was a trace of silver and no gold, that is to a ton, 2,000 lbs. The next sample was "Down canon on location." That is No. 2 sample. The result was silver a trace, and gold none. "Twenty feet over the summit." No. 8. That is a trace of silver and a trace of gold. The next sample is "Going out of Rock Creek." No. 4. No silver, no gold. "On grade going out of Rock Creek." No. 5. No silver. No gold. "Country rock No. 1 sample." No silver, no gold. That is all, 8 samples.

CROSS EXAMINATION.

By Col. Herring. 824

I did not make an assay for any other minerals in those samples of rock. I was not requested to make any other assay; just gold and silver.

Charles W. Smith, a witness sworn for the plaintiff in rebuttal, testified as follows:

By Mr. Bennett.

I live at St. David on the San Pedro River, in Cochise County. I know one Rock Creek. There is not more than one in there that I know of. I have lived in there. 825
I lived at the mouth of Turkey Creek. I couldn't tell how far exactly from Rock Creek, but I think it is about—take the road that goes into Rock Creek, it is about 3 miles from the mouth where it empties into the valley. That is not Turkey Pen; Turkey Creek. Turkey Pen empties into Turkey Creek. I was working for wages and teaming there, for different parties. I believe as near as I can remmber it was about '88 or '89 in the winter that I went there. That is on Rock Creek. I staid there about four years or a little over, in that vicinity. When I first went 826
to work there, worked for Mr. Ross. Afterwards I worked for myself, driving my own team. When I was driving my own team I was hauling lumber, for Mr. Ross. I was hauling in different places. I hauled out of Rock Creek. I know where there has been timber cut in Rock Creek. I know where a good portion of the timber cut by Mr. Ross was cut from. I should think, to my judgment, it covered about three miles in length and probably a mile in width. I have been up above the upper mill setting. I am not familiar with all of the canons in there. I have been up 827
both canons, one a part of the way and the other one, up to the head of some tributaries, some a little side canons, but I havn't been to the head of either one of the main canons. I do not know of any mines in Rock Creek. I

never saw any in there. I never heard of any paying mines in Rock Creek. The grass in some parts was very coarse,
828 and in other parts very scarce. I have seen a few head of cattle in there. I never saw any sheep there. They were not there while I was there.

Mr. Bennett: We next offer and read in evidence under the stipulation, the deposition of Thomas Price. The stipulation is as follows:

"In the District Court of the First Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the District and Circuit Courts of the United States.

829 United States of America Plaintiff.

VS.

Daniel D. Ross and the Copper Queen Consolidated Mining Company, a corporation, Defendant.

STIPULATION.

It is hereby stipulated and agreed by and between the attorneys respectively, for the above named parties that the deposition may be taken of one Thomas Price, now a
830 resident of the City and County of San Francisco, in the state of California, and who lives at a greater distance than one hundred miles from the city of Tucson, in the Territory of Arizona, the place where United States Court is held for the said First Judicial District of said Territory;

That said deposition be taken upon the annexed interrogatories, and cross-interrogatories, if any there be,
831 hereby waiving statutory issuance of commission and notice.

That this stipulation shall be authority for any person authorized by law to take depositions, to cause to

come before him the said Thomas Price and make full answers to the said interrogatories and cross interrogatories, if any there be, hereto attached. 832

That the same shall be duly filed with the clerk of the said court and that said deposition may be thereafter introduced and read in evidence upon the trial of this case, subject to all proper objections and exemptions at the time of its introduction, as to its competency and relevancy.

Dated May 13th, 1898.

ROBERT E. MORRISON,
Attorney for Plaintiff.

WILLIAM HERRING, 833
Attorney for Defendant.

Pursuant to the foregoing stipulation, the deposition of Thomas Price was taken on the 20th day of May, 1898 before Clement Bennett, a notary public, at the City of San Francisco, Cal.

Thomas Price, a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

My name is Thomas Price. I am sixty-two years of age, an assayer by occupation, and reside in the City and County of San Francisco, State of California. 834

I am the senior member of the firm of Thomas Price and Son, Assayers, of San Francisco, California.

On Nov. 29th, 1897, I assayed some samples of rock or ore received from Waldemar Lindgren, U. S. Geologist.

The samples were delivered to me by Wells Fargo & Co's. Express, contained in two boxes, marked respectively "No. 2" and "No. 5." Box No. 2 contained samples numbered from 6 to 8 inclusive, and 15 to 23 inclusive, or in all twelve samples. Box No. 5 contained samples numbered 24 to 29 inclusive, or in all, eleven samples. Total 23 samples. These samples were contained in pint glass 835

jars with screw tops, closed by glued paper slips. They were also tied with white pieces of string and sealed on the
836 top and side. The seal bore the imprint reversed, of part or whole of the words "Eagle Lock Co., Ferryville, Ct." The boxes were tied and sealed with the same seal. The number of samples so received was twenty-three, and the assays were as shown on the annexed certificate of assay. (The certificate of assay produced by the witness is marked by the Notary "U. S. Exhibit No. 1 Price."

(Signed) THOMAS PRICE.

The Court: Gentlemen of the Jury: It is now about the usual time for adjournment and the Court will ad-
837 journ until Monday morning. And you will bear in mind the admonition previously given you not to converse with any other person nor permit any other person to address you on any subject connected with the trial of this case; not to form or express any opinion, but to hold your judgment in abeyance until the case is finally submitted to you.

You will return here Monday morning at 9 o'clock.

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838 Tucson, Ariz. June 6, 1898.

All parties present; jury called; all present.

Thos. G. Gerdine, called as a witness for the plaintiff, in rebuttal, was duly sworn, and testified as follows:

I am a surveyor; I am a graduate of the University of Georgia; I am engaged with the United States Geological Survey as a topographer; I have been in that employ for about three years; and I have also been in the employ of the General Land Office. I have been engaged in surveying
839 seven or eight years; my duties have carried me mostly in the western part of the United States; I will look at that map; I made that map; I didn't make all of it; Mr Lingren made a portion of it; I made the actual surveys upon which the map is based; that is the topographical part of

the map; I made the map from actual survey made by the General Land Office; I was on the ground and started out from government corners and proceeded to do the work 840
from those corners; I was in Rock Creek Canon and made this survey.

CROSS EXAMINATION.

This map does represent unsurveyed portions; that part would be designated Tps. 18 & 17 S. R. 30 E.,that was surveyed or a portion of it rather; I don't say that I made this map from the plats of the United States Land Office, I made the map; the map is based on stadia lines that were 841
run from previously established corners; the map is made to a scale; it is on the map; it is marked "one inch to the mile; I did not put those colors on the map; I was not at all of the points named on the map; most of those points are obtained by a system of circleatory triangulation; I think they were all obtained by triangulation; I didn't locate all the points but those that were located and that I did not locate, were connected to a system of triangulation that was carried on throughout the map; I made the whole map, principally, except the numbers that are numbered 842
here, 6, 7, &c and those were not located by me but were connected to my stadia lines and triangulation; I made all the map except the coloring, the yellow and red and the numbers 1, 2, 3, 4, 5, and so on, principally; some of the elvations were not made by me; some of the elevations were taken from anaroid readings on the top or summit of this range; I guess I can tell the number of places that I was not at, that are marked upon the map; this map is a correct survey of the ground shown.

(Reporter marks for identification "Z") 843

Prof. Waldemar Lindgren, called as a witness for the plaintiff in rebuttal, testified as follows, after having been duly sworn:

My name is Waldemar Lindgren; I am a graduate of Freiberg,Germany; of the Mining Academy, it is called; I have the degree of Mining Engineer, from the Mining Academy of Freiberg and also a special degree of Surveyor also conferred by that institution; I was appointed Professor of Mining and Metalurgy of Stanford University last year; my profession is Mining Engineer; my present occupation is that of geologist; I have been engaged in the occupation of Geologist and Mining Engineer since 1883; I have carried on my profession in various parts of the west; in 1883, I was engaged in prospecting coal lands for the Northern Pacific in Montana; in 1884, I was engaged as assayer and assistant at the smelter in Helena Mont. In 1885, about the first of January, I was appointed assistant geologist on the United States Geological Survey and I have remained in the Geological Survey ever since;my duties have been to report on mines and mining district in differnt parts of the west. For nine years I was examining gold mines in California. Within the last two years I have been examining mines in Idaho; I have also examined mines in Washington, Wyoming, Montana, New Mexico and Southern California, for the United States government; I have worked as a miner and have performed all of the duties of ordinary miners such as drilling, blasting and hoisting——but that is more as an engineer, and timbering shafts and drifts etc. I prospected lands, coal lands, in the employ of the Northern Pacific Railroad and I have prospected mineral lands off and on, having been requested by the Geological Survey, whenever the problem arose requiring expert service as to United States Mineral lands, as we sometimes have to do; I have examined lands over a large area of the western part of the United States; I have also undertaken, at the request of the Director of the Geological Survey, the examination of certain districts in order to determine the mineral or non-mineral character of the lands. That involved prospecting and sampling and all that sort of thing. Generally, I am requested to exam-

ine a certain parcel or a certain tract; it may be a township or it may be a section or two; and I am called upon to seggregate that according to the sections or quarter sections and into mineral and non-mineral land; I have been in Rock Creek Canon, in Cochise County, Arizona; I was sent out, ordered by the Director of the Geological Survey to examine certain lands; the lands specially mentioned were townships 17 and 18 South, Range 30 east, Cochise County, as to their mineral or non-mineral character. I was there in that vicinity about 12 days, may be not more than 11; 11, 12 or 13 days altogether; I made the colors on that map indicating the geological formation. I also inserted the number relating to certain samples taken by me; I know that the survey is substantially correct because I tested and examined it myself; I ran my lines along the stadia lines indicated here in order to satisfy myself of the approximate correctness. Of course, the stadia lines of Mr. Gerdine are absolutely correct. I have also examined certain other portions of the map in order to test it. The map, within the scale of my judgment, is a correct representation of the country. (Map introduced in evidence.) (Marked Plaintiff's Exhibit 3.)

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CROSS EXAMINATION.

I certainly do not say that I have been over every foot of the ground marked in pink or in yellow either; I do not mean to say that every foot marked in pink is trachite or that every foot marked in yellow is rhyolite, but it is correct as a geological map; I cannot swear to each individual foot of that land but I can swear that it is correct as a geological map, indicating the pre— When I put pink over a certain portion of this map, that is the character which would be indicated on any geological map; it means that I have seen nothing else than what I have indicated there; when I put a coloring of pink upon any area of country, it indicates the predominating character of the land and it

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also indicates to the best of my knowledge and belief that there is nothing but that kind of rock there on that land;
852 I have not examined every particle of the surface and consequently I cannot swear to it.

RE-DIRECT EXAMINATION.

I left Willcox, Arizona, on the 31st day of October, and I arrived in the Chiricahua Mountains early on the morning of the first of November; I left the Chiricahua Mountains on the 22nd day of November; I was in there 22 days, in 1897.

853 Rock Creek Canon is a comparatively narrow canon in the Chiricahua Mountains; heading at the backbone; the backbone having an elevation of from 7 to 10,000 feet; the canon has no forks except high up, where it branches into two or three smaller branches; it is seggregated by ridges about a thousand feet high from the canon to the north and south thereof; the canon north of it is Pine Canon and the one south is Morse Canon; some call it Turkey Canon; those ridges are characterized by sharp bluffs to a great extent, and are the ridges that separate
854 the canons and the geological structure is very easily and is exceedingly well marked and is plainly visible from many points, and you can look over the whole district and see the rocks; there is very little level ground but there is some on top of the mountains where there is a plateau and there are also little flats of level ground in Rock Creek in a few places; now the geological formation consists entirely of volcanic rocks; as I understand it and as I interpret the structure there was, before the volcanic flows took place, a small ridge or series of ridges of formations of limestone,
855 shale, sandstone, etc. When the volcanic eruption took place, the lavas broke through these formations, and flowed out on the surface covering it entirely; these flows extended over a considerable period, probably, and they piled up to a depth of about 4000 feet in the deepest locality

and then gradually tapered or gradually diminished westward; on the westward there was a gradual slope and on the eastward there was a bolder slope; in the region of 856
Rock and vicinity proper, when the lavas had been erupted, there was left between the eruptions a level plateau, and as the storms and rains beat down on this plateau, the water courses were outlined; the course of Rock Creek, and Morse Canon and Turkey Creek were outlined; and the slide rock was gradually carried away, pieces broke loose and were carried down by the waters and in that manner. Rock Creek Canon, as well as the other canons, have been gradually eroded, so that every particular particle of the slide which once filled the canon, has been passed through 857
there and been washed down by the flows. Of these eruptive rocks there are two kinds, one is a dark gray to a dark brown porphyritic rock which I have indicated by pink on the map; and the other is trachite; it is a little coarser in places, but it is practically what geologists call trachite; it is a rock which has flowed over the surface of the ground; the thickness of that is probably up to a thousand feet or fifteen hundred feet; it is exposed in the basins of Rock Creek as well as in the canons; it also appears on the summit of which I have called Rigg's Peak; but what the other 858
map calls Heliograph Peak and it occupies a small area on the summit of the mountain; as to this rhyolite, that is a rock of different chemical composition from the trachite; it is an older flow and flowed out over the surface of the trachite and has a thickness of probably from 3,000 feet down to 1,000 feet or less; it is a compact, hard, yellowish gray to a brownish gray rock and it outcrops here very plainly visible and there are abrupt yellowish gray places that can be seen along for miles and miles; this rhyolite forms the capping of the ridges principally; I have indicated it on the may by a yellow color; as the lavas broke 859
through the interlying formations, thousands of pieces were carried along with them,loose pieces that were broken off from those formations and which now may be found

as they are in all gangues of volcanic rocks and may be included as fragments which broke through those rocks; that
860 is about the general construction. I took samples where there were indications of prospecting or where my judgment indicated it might be possible to find gold and silver or to find some valuable metal; I have designated those points on the map by figures in black ink, such as 6, 7, 15, 21 and so on. The first is No. 27, taken from the divide separating Turkey Creek from Rock Creek, as you come up from Turkey and cross over the divide into Rock Creek, the rock in places there seems to be decomposed and brown. I took a sample of that brown rock as it appears right there in the gap close to the road; about a third of a mile from the lower mill setting; a little southwest; close
861 to the main wagon road; the road that leads into Rock Creek from Turkey Creek; that point is about three or four feet from the road; that material appears similar all over the gap there; reddish, brown decomposed rock; that is No. 27; the cause of the decomposition, I should say, was waters of some kind, changing the character of the rock and staying over the iron contained in it, converting it into iron oxide; I didn't find any valuable deposit at No. 27; I took that sample from different places, say an area of two or three feet; picked up some four or five pounds
862 and put them in a canvass sack which I carried for the purpose; I put a label in it that I numbered 27 and I tied up the sack and put it in my bag; I carried these sacks along with me until I came into camp in the evening; I kept them in my possession during the time; the area of this decomposed trachite? As you go up Turkey Creek, the rock begins to look near the head a little brownish and decomposed and the whole of the gap, I could see fifty feet probably, on each side, of the same brown color and
863 on the other side the same discoloration extended over there along the road until you come to the second little gap where you go down to Fitch's place; there was no development work at this point; I took sample No. 27 to

camp in the evening; I took the sack to the camp in the evening and put it in one of my boxes; I took several samples in the field and would take them to camp and there 864
break the rock and grade them and prepare the samples; I prepared No. 27 as the others; I broke the rock and pulverized the pieces and graded it down, and put the pulp in pint glass jars, with screw tops and placed in each jar a label with the number; there were twenty-three samples in all and they were in two boxes; the number on one box was No. 2 and the number on the other box was No. 5; No. 2 had samples numbered 6 to 8 inclusive and 15 to 23 inclusive, 12 samples; and in box 5 there were from No. 24 to No. 29 inclusive and 32 to 36 inclusive—11 samples; I 865
put the pulp in each jar with the label and screwed the tops down and pasted paper slips over the top and sides and then I tied a piece of string over that paper and following the corrugations of the cap, I tied it; and I sealed it on the top and sides with red sealing wax and impressed my seal on them and the seal has the reverse impress of the words Eagle Lock Co. Ferryville, Ct. The boxes were tied and also sealed with my seal; that is all; the key I had in my possession and I put it in my box when I went to camp at night and, after I prepared it as I have said, I seal- 866
ed with my seal, sealed the jar and boxes with my seal, and forwarded it to Price & Son, San Francisco; I sent 27 away to Price & Son, San Francisco; before I sent this 27 sample, I looked over the jar to see that the seals and papers and string etc., were O K in what condition they were and they were in proper condition; I sent Sample 27 to Prof. Price, San Francisco, and I also sent a sample, I think, to Mr. Burlingame, Denver; I divided it into two portions and sent it by Wells, Fargo & Co. express; I delivered to the Express Co. myself; the number of the sam- 867
ple I sent was 27.

Mr. Morrison: I now continue reading from the deposition of Thomas Price, the certificate of assay which is marked "U. S. Exhibit No. 1, Price, Clement Bennett, No-

tary Public etc. No. 27 is under the column of "marks"; Gold, Oz. per ton, none; Silver oz. per ton, No. 27, none;
868 Total value per ton, none.

Witness: Returning to the point from which I took sample No. 27, I walked along the road leading from Rock Creek it appeared to run around the head of a little ravine pretty near the line on a line; and where I came pretty near the second little gap where the road goes down the side and I was probably 100 feet from the gap where there was a seam may be 5 or 6 inches thick of white quartz which was contained in this same brown decomposed matter; I took a sample of that quartz; I took two and those
869 samples are marked 24 and 26; I have designated that point on the map by a little black dot; these points were right together; I took samples of the brown rock surrounding the quartz, on both sides; there were no valuable mineral deposits there; I examined the samples carefully and I found no trace of valuable mineral deposit; I took the samples because in my judgment there was a possibility of it containing something; under my instructions, the assayers were to assay for gold and silver. I gave those instructions because, after the examination of the samples,
870 to the best of my judgment, there was no use in making any other tests; it didn't, in my judgment, contain anything else that would justify an assay; I judged that not only from the rock but also from the sample taken from the whole outcrop from which I took a sample.

Mr. Morrison: Again reading from U. S. Exhibit No. 1, under the head "marks," 26, 24, gold oz. per ton, trace; silver, oz per ton, trace; Total value per ton, none.

Witness: At the place I have just described, there
871 was no indication of work having been done; the cutting of the road left it exposed. In going from one point to another, I was walking on foot and made a careful examination and had my prospecting pick along and I prospected every little while and looked at it and I didn't find any-

thing else that justified me in taking a sample other than previously stated. I then passed to the little gap where they all go down into a precipitious place to the mill setting on Rock Creek; point 24 and 26 is about a quarter of a mile from the mill setting; the point 24 and 26 is about a quarter of a mile from point 27; 27 in a southwest direction from 24 and 26; at that point I marked 25 is where the road crosses the gap; I noticed a little hole sunk about 50 to 100 feet from the road; and I went there and found a hole which had been dug by a prospector, I presume, which was about three feet deep; from that hole, I took the sample marked 25; it was a loose, decomposed rock; I examined it carefully. There was no valuable mineral deposit there, to the best of my opinion. I examined the hole all around and all around the hole; I made a careful examination; I examined these samples carefully as I took them, I took about the same quantity for my samples each time; at this point, this formation extends along the road from back southwest as I have stated, up to the north and northeast and there it stops and you come to fresher rock; the decomposed area there is confined; it stops in that vicinity; this was a small prospect hole; 2, 3, or 4 feet; I treated this sample 25 in the same manner as I treated the others; I examined it carefully with my magnifying glass and put it in my bag. 872 873 874

Mr. Morrison: Reading from same exhibit No. 1; in the column under the head of "marks" is the number 25 and under the column of gold oz., per ton, is "trace;" silver oz. per ton, trace; Total value per ton, no value."

Then I went down the grade to Fitch's old place near the lower mill setting and from there I proceeded up the canon; over the road from Fitch's to Ross' highest mill setting, I was over four or five times; I examined the rock as I went along; was of a fresh, undecomposed matter and to the best of my judgment and belief there was 875

no use in taking a sample of it for it would not assay anything; there was no chance of it; then I got up to the mid-
876 ...i setting from there, there is a trail that goes over into Pine Canon, in a northerly direction; I have been over that trail, and the rock is fresh and I saw no indication of decomposition; the rock is hard and fresh; as you go up the hill on the trail, it becomes a little reddish and looking decomposed; at the divide and leading into Pine Canon, there is an area of perhaps fifty feet, which extends quite a way down on the Rock Creek side; I should say 100 feet, possibly; the rhyolite which is the prevailing rock of the country is red and decomposed; at that place I took a
877 sample; I selected a place where it looked much decomposed; marked the sample 21; sample from rock in place; I chipped pieces off here and there over an area of 3 or 4 feet and put in a bag. The decomposition was probably caused by waters, acting on the composition of the rock; I found no valuable mineral deposit there; I examined the rocks and specimens carefully and saw no indications of valuable mineral; this was on the Rock Creek side, close, perhaps 200 feet from the summit of the divide; I heard Prof. Ricketts on the stand; this is place that Dr. Ricketts tes-
878 tified to and called No. 7 on this other map; on the divide between Rock Creek and Pine Canon, about two hundred feet down on the Rock Creek side, I examined some of that decomposed rock on the summit and it did not look to me as good a piece to contain anything as it did below where I took the sample.

Mr. Morrison: Reading from same exhibit No. 1; No. 21, Gold oz. per ton. none; silver per ton, none. Total value per ton, none.

879 Witness: Now at the place where Pine Creek forks, is the place where the old Riggs mill was; the mill was there until last summer; between the forks, there is a little flat that runs up from near the junction of the creeks; and then there is a bluff that rises pretty steeply and the rock

there is of an intense red color and it is perhaps 200 feet high; as far as I understand it, it is point No. 8 testified to by Prof. Blake; at that point, I made an extensive and careful examination; I was there three days and I saw a man by the name of Frank Williams there; he was with me there once on my second visit; he is the Frank Williams who testified in this case; there is at that place an area of perhaps from 50 to 100 feet where the rhyolite has decomposed and brought the rock into a red color; and in that reddish colored rhyolite, there are a few little quartzite streaks that disappear and come in but these quartz seams appeared in only a few places; I examined that locality first in the creek below the old mill setting and there the width across, I presume, is perhaps 25 feet; it is a rhyolite but the rhyolite is decomposed and is a little soft and of a reddish color but otherwise there are no indications of it containing anything; I took a sample across the distance of about 10 or 15 feet; that sample is marked No. 6; that was down the creek; right in the creek; I did the same with that sample as with the others. 880 881

Mr. Morrison: Reading from the same Exhibit No. 1, there is No. 6: Gold oz. per ton, trace; silver oz. per ton, at 59c $0.06; total value per ton, $0.06. 882

Witness: The next point was right in the creek in the north side of the creek; from there I went up on this red bluff and went over that at different places while I was there; that bluff is marked 8; I examined the rocks exposed on the bluff very thoroughly and took two samples from it; the first sample is marked 7 and was taken from an area of perhaps four or five feet; I chipped off pieces along the outcrop where the rock appeared very red. This is my number 7; this is at the places where the bluff rises up over the flat possibly fifty feet above the place where you see the rock actually sticking out; I got it from the bluff; I found nothing I considered valuable indications of mineral; this is from rock in place. 883

Mr. Morrison: Reading from the same exhibit No. 1: there is No. 7: Gold oz. per ton, trace. Silver value per ton, at 59c, $0.03.

Witness: That red color might have been caused by one of two things; it might have been caused by decomposition of the rock itself in the existing form of the iron that the rock contains; it is a well known fact that rock contains a small per cent of iron, all rock, combined with silica and when water gets on the rock, the iron is changed in such a shape it appears red; it might have been caused by the decomposition of iron pyrites; the red color is no indication of copper but in some copper ores you find red stain; this red stain was no indication of copper; I went a little higher on that bluff, at a distance of a thousand feet from the old Riggs Mill; there I found the same red stained rhyolite and in addition, I found some quartz ledges running through in different directions; they were small veins of perhaps an inch, 2 or 3 inches; south from this point; this is marked with a black spot and number 15; at this place, I found different quartz seams and I thought probably it would be best to take a sample, so I picked out the quartz carefully, judging that to be the most promising material and took a sample of that so as to show the value of the quartz seams; I examined very carefully and found no copper stains, as I did all over that place; I treated that sample as I did all of the others; that is No. 15.

Mr. Morrison: Reading from the same certificate of assay U. S. Exhibit No.1, "Marks, No. 15, Gold oz. per ton trace; Silver oz. per ton,trace; total value per ton, no value.

Witness: Then I followed the trail, followed that fork up the trail described under the number of 21; 6, 7, and 15 were taken at the forks of Pine Creek; I came from there down to 21, just on the divide between Rock Creek and Pine Creek; as I can remember, the red stone at 21, on the

divide between Rock Creek and Pine Creek; that continued
north some distance and then there was a break and then
it disappeared again on the other side of the south fork 898
Pine Creek; I think there was an interruption between
those two streaks of red stone, but I wouldn't swear to it.
Continuing in Rock Creek from the point mark
passed up Rock Creek from Ross' second mill setting to
the third mill setting and passed up that distance several
times, sometimes on foot and sometimes on horseback and
I found nothing between those points to warrant my tak-
ing samples; it is fresh, undecomposed, gard slide trachite;
there were no veins of quartz or anything of that kind in
anything that I saw there; I examined in the main creek, 899
but the gulches came in from both sides; then I came up
to the Ross' upper mill setting and found some trachite
there and I examined the creeks and ravines carefully but
found nothing there, then I went up the ravine to the
south, I don't know the name of it; it is right up over Ross'
old mill setting down to the south; I went up that ravine
perhaps a mile to the summit which divides that portion
of Morse Canon or Turkey Creek and Rock Creek; I ex-
amined there but found nothing that would warrant tak-
ing samples; I followed that divide up to a very high peak
but found nothing; I walked perhaps a half a mile; then I 900
turned and went back to the gap leading over from Rock
Creek into Morse's canon and then I walked up the other
side and right across and porphyritic rock there on the
other side of this little gap which divides Rock Creek from
Morse's canon; I refer now to Rock Creek; at Ross' last
mill setting, I examined the creek bed and the float and
then I took the divide between the two forks and followed
up one of the forks a distance of half a mile or perhaps a
little less and then climbed up the divide on foot and fol-
lowed the divide up to the backbone of the Chiricahua 901
Mountains. That was the divide between the two forks;
in an easterly direction from the last mill setting; about
half way up the divide I found the same decomposed rock

again; some rhyolite; it was a little bit soft and of a greenish color and was a little reddish stained by iron; of that,
902 I took sample No. 24; as to that place, I would not swear whether it was in place or not but I think it was; there were some big boulders there; that was between the backbone of the Chiricahua Mountains on the east and the forks of Rock Creek on the west; that covered an area of perhaps a hundred feet, from which the rock appeared to be decomposed. There was no quartz; it was rhyolite; a little brownish and greenish in places; I examined a number of specimens and I could not see that it showed anything; there was no indication of mineral there.

903 Mr. Morrison: Reading from the same exhibit No. 1: No. 34, Gold oz. per ton, none; silver oz. per ton, none; total value per ton, none.

Witness: Those were all the samples I took on Rock Creek; all the places that I thought would justify samples; I found no mines or locations of mines in Rock Creek Canon; in Rock Creek Canon, in the country from which the timber was cut; I have described that little hole where the road comes down to Fitch's ranch and that was the
904 only working I saw; a quarter of a mile south of Fitch's ranch, I guess; I consider Rock Creek Canon a very unfavorable place for prospecting for valuable mineral deposits; I should say that that canon and the ground over which the timber was cut is very unfavorable for the development of the ground and I wouldn't advise any one to spend any money there as it would be thrown away in my opinion; returning to the map, I had passed over the divide between Rock Creek Canon and what you call Morse's creek; in that country, I first examined a certain quartz vein which
905 cropped out on Turkey Creek, about a mile and a half southwest from the lower mill setting on Rock Creek; this point was testified to by either Prof. Ricketts or Prof. Blake, they are Nos. 5 and 6 on this map; there I found two quartz ledges which cropped out in there in a

little decomposed trachite; those were in close proximity to the house of a man by the name of Tompkins; were about a third of a mile from his house northeasterly, in the 906
east side of Turkey Creek, he showed me where he had found some quartz; I saw two veins there at two points; I couldn't trace them very well but I saw float for some little distance to the north and south of the location; I presume they were continuous, I should say for 100 feet anyway; there was a little decomposition there; the rock was softened; that was all; the decomposition was a sort of a grayish brown color; I marked it 32 and 33 on my map; the lower quartz vein,which was about 200 feet in a northeasterly direction, showed a 4-inch quartz vein of some- 907
what honeycombed, cellular quartz, separated by a little clay from another vein; that was number 32; number 33 was perhaps 50 feet above this, on a slope in an easterly direction and it showed a two-foot vein of solid quartz, a little cellular and a little honey combed in places; on that quartz there was a little work done, a hole about a foot and a half deep; it was dug right on the quartz vein and was about a couple of feet wide; from my own inspection, I found no valuable mineral whatever at that point; I took samples of what I considered the most plausible for con- 908
taining value.

Mr. Morrison: Referring to the same exhibit No. 1; under the column "Marks" Gold oz. per ton, none. Silver oz. per ton, none; total value per ton, no value; No. 33, Gold oz. per ton, none; silver oz. per ton, none; total value per ton, No value.

Witness: From those two outcrops, I chipped off little pieces from an area of perhaps 2 or 3 feet.

That was all I found on Turkey Pen Creek; then 909
I continued up Turkey Pen Creek up to the south branch, and I found a little float in one or two places but I couldn't find any quartz in place; then I went across in a southeasterly direction and followed this road that runs

through the gap there; along the distance there was nothing that I could see. Then I came to the old Morse Mill
910 setting and in that vicinity there are several quartz ledges; this country was testified by either Prof. Blake or Prof. Ricketts; referring to their map, approximately, they would correspond with 2, 3 and 4 in what they call Ward Canon; I can't say whether they are the same outcrops exactly; going from Morse's old mill setting, I explored the canons or ditchers' forks of Morse Creek very carefully; above a certain point, say half a mile above the mill setting, I found practically nothing; I took a specimen, No. 36,
911 from a vein of white colored quartz, 4 inches thick; it is in decomposed trachite and is exposed right in the bed of the creek of that canon; there are small veins there; the country rock might have been a little brownish; that was solid white quartz in place; two or three feet appeared at that place; there was a little on both sides across the canon bed; I treated that sample the same as I did the others; it was marked 36.

Mr. Morrison: Reading from same exhibit No. 1: "Marks No. 36; Gold oz. per ton, trace; silver oz. per ton,
912 trace; total value per ton, no value.

Witness: Now going up from Morse's mill, you go up there a short distance, about a thousand feet or the eighth of a mile or so and you come to a little canon that comes in from the south. Between that canon and the main canon is the backbone of the ridge that runs up to the height of a few hundred feet and on the slope a little above the canon, I began to find quartz float; I followed that float up all the time but I didn't succeed in finding any rock in place until I came to the top of that little hill, one mile east of
913 Morse's old mill setting; at that place I took a sample which is number 22; I am talking about what is on that map as Ward Canon; on the other map, I couldn't locate it exactly but it may be 2; that is the quartz I am talking

about; it is marked on my map 32; at 32 there was trachite on both sides, very little decomposed and on top of the hill a three foot quartz vein showed of massive solid white 914
quartz; there were four or five feet exposed, maybe; I chipped off pieces over an area of two or three feet and put them in my bag; from my own inspection I found nothing whatever of a valuable mineral deposit; that is No. 22.

Mr. Morrison: Reading from the exhibit No. 1; "Marks" Gold oz. per ton, trace; silver oz. per ton, trace; total value per ton, no value."

Witness: Then I continued on in that direction until I found that quartz vein didn't continue any further 915
south; the rhyolite came in above there and there was fresh rock every place; then I went back to Morse's old mill setting and right there, near the slope, I found quartz exposed in more or less large pieces, that was a few hundred feet from Morse's old mill setting; I examined that country very carefully and examined the float carefully but it didn't show anything; but there I found a location notice, and a little hole dug; that was about a thousand feet northeast of Morse's old mill setting; that was about two miles and a quarter from the lower mill setting on 916
Rock Creek, south; there was a location notice there which said "Pansy Claim" and was located by a man by the name of Barclay; the location notice was dated in '94 but there was no indication of recent work having been done there; there was hole three feet deep and perhaps two feet long and two feet wide; it had caved in; it was deeper when it was dug; I found there a vein of white quartz; that is number 28; the vein was a foot and a half thick and it was white quartz, solid white quartz; it was without indication of anything; it was exposed about 6 x 6 or 7 x 7, I suppose; 917
I took a sample of it; it was a foot and a half wide; I found nothing in the way of valuable mineral deposit; by my own inspecction, I found no trace; that was the Pansy Location No. 28.

Mr. Morrison, reading from the same exhibit No. 1:
"No. 28, gold oz., per ton, none; Silver oz. per ton, none;
918 total value per ton, no value."

Witness: Then I went down what is called Solisbury Canon; Ross' lower mill setting is about 2 miles and a half or three miles southerly; this is Ward Canon on the other map; it comes into Morse' canon from the north; I examined the canon carefully and I found nothing that would justify me in taking a sample; the character of the rock there is hard, fresh trachite; then I went
919 up the middle canon which emptied into Morse's canon, right at Morse's old mill setting and went up that canon which comes into it from the north and that canon is over towards Turkey Creek Canon and runs in a northerly and northwesterly direction; two or three miles from the upper mill setting of Ross; the north side of the creek; I panned Rock Creek a little below Ross' lower mill setting; I went out on one of the days that I was there and went over to Rock Creek near Ross' lower mill setting and I took a pan along and a
920 pick and shovel and I went below the old mill setting perhaps one hunderd feet or maybe 200 feet and I took the gravel occurring there and panned it out; one pan contained two colors I should say; I washed 12 pans of the gravel; I went up and down some two to three hundred feet and picked pans from nice places where I would think it might be promising; I panned 12 pans very carefully; as carefully as I knew how and I didn't get a single color that I could see with my naked eye nor with my magnifying glass for that matter; I have had pretty good experience in panning for I used it so much in California, pos-
921 sibly 8 or 9 years; if there had been a color in it, I would have found it; I exercised very unusual care because I was determined to get it if it was there; I was engaged half a day in this panning; well, in Ward's canon or Morse's

canon as I call it, I washed 12 or 13 pans at a place about a thousand feet below Morse's old mill setting; I found no color visible to the naked eye and did not even find a color 922
visible to the magnifying glass after very careful panning; I didn't pan in Turkey Pen Creek; there was no water there. From my experience with gold mines and gold deposits, it shows conclusively that there are no valuable gold deposits above the place where I pannd on Rock Creek; and it also shows, in my opinion, that there is nothing like a reasonable probability of there being any other valuable deposit for the reason that is in this country and in the western part of the United States, gold practically always or nearly always accompanies deposits of other valuable 923
mineral.

No. 23 is the point on the divide between Pine Canon and Rock Creek, about a mile and a half above and to the north of Ross' mill setting, lower, and refers to specimens that were taken by my assistant there; his name is F. C. Gray; I didn't connect it with the geological survey; he transferred the sample to me when he came in in the evening and I took charge of it; I took same samples in Ward Canon or Morse Canon, just at the place where Morse's 924
old mill setting or rather just below the old mill setting; there in that canon I found quartz float; I didn't find the quartz in place but I found a large boulder which had rolled down from somewhere and was lying in the bottom of the creek; I took a sample of that; it was solid quartz; strictly speaking, it was float; that is No. 29; no it is No. 31; I did not find the ledge from where it came; I didn't see any ledge around; I took no further samples in this canon but Mr. Schroder which is No. 30 and which was a float test; I took another sample which is numbered 29, 925
on the slope just north of Morse's old mill and which was white quartz; that was float; I found no rock in place there; Nos. 19 and 20 are practically on the summit of the mountain close to a sharp peak, about a quarter of a

mile south of what I have called Riggs' peak but what is marked on the other map as Heliograph peak; it is two
926 miles northeast of the upper mill setting on Rock Creek; It is on the west side of the backbone; it is verv close up to the summit but it is a little on the Rock Creek bluff and a little on the west side of the backbone; at that place I found an indefinite area of decomposed and brownish trachite; there is a spring a little distance west of Riggs' peak which comes out on a little flat and which I was told was Bear foot spring; this point is a short quarter of a mile southeasterly from that spring on the west slope of the mountain a little over the summit; I examined this trach-
927 ite I have spoken of and discovered it in little seams of quartz, brownish, white and greenish quartz, stained with iron; these seams were running in a different direction; changing around and pointing around and playing out and coming in again; the quartz was solid hard quartz; from my examination, I found no indication of valuable mineral deposit at this point; I took two samples,19 and 20; 19 is from the quartz in place; 20 is from the brownish decomposed trachite; it is also in place; the discoloration is caused by iron.

928 Mr. Morrison: Reading from the same exhibit No. 1, No. 19, gold oz. per ton, trace; silver, oz. per ton, trace; total value per ton, no value.

Witness: Points 16, 17 and 18 on my map are a little over half a mile from Riggs' new mill; on their map No. 8; I found in that place float; all these three samples were float; I didn't find any rock in place; one of them is decomposed trachite; the other quartz somewhat similar and the third is hard solid red quartz stained with iron red right through the mass.

929 There is one place which I have examined contiguous to Rock Creek Canon and which I have not described; it is marked 8; it is on the south side of Pine Canon two and a half or three quarters north of Ross' second mill setting;

located about a half a mile or three quarters southwesterly. I think there was evidence given of this point, on the part of the defendant; I went up there; I believe Riggs told me 930
of the place and said there was some little prospect hole there that contained silver; I went there, right up the ridge from Pine Canon and pretty close to the divide; I found some old holes, old workings; as well as I remember there were two holes, rather large, 5 x 7 or something like that and may be three feet deep; and showed quite a brownish trachite in that place; and in that trachite were little stringers of quartz and little stains of iron, a green iron stain; I picked out quartz from there and had it assayed; it is marked 8. 931

Mr. Morrison: Reading from the same exhibit No. 1: No. 8 gold oz., per ton, 0.10; silver value per ton, at 59c 0.06; total value per ton 0.06."

Witness: I found a place where they had commenced driving a tunnel; the rock looked like it; but I wouldn't swear to that positively; between the places where I took the samples, I was always looking at the rocks and examining the rocks and breaking off pieces from them and looking out for decomposed rock; I examined all the ravines and creeks that I passed or came to to find float or 932
anything and when I found float, I generally followed up to see if I could find it in place.

Q. From your examination of Rock Creek Canon and the country immediately contiguous to Rock Creek Canon, what do you say as to its being mineral or non-mineral?

Objection; sustained.

Exception.

Witness: I don't think that Rock Creek and the country contiguous to it would justify an expenditure of any 933
money, and after I have concluded my investigation, that was my conclusion. I did not see anything there that would warrant any miner or prospector in spending his

time there in doing development work; as a result of my examination, I found no ledges or deposits that in my
934 judgment would pay to mine or mill; as a result of my judgment and examination of those lands from which the timber was cut on Rock Creek Canon, they did not contain any valuable mineral deposit that would justify a reasonable man in mining and doing development work on it and milling the same, with an expectation of profit.

I saw a nice patch of grass at the upper mill setting; I know because we had our animals hobbled up there and they got good feed; I saw some grass at the middle setting and also at the lower setting at a little place in the creek;
935 I also saw scattered grass on the sides of the hills in different places; I don't think I saw any cattle in Rock Creek; I saw no sheep there; as to the vegetation, in the lower part there may be some oaks, scrub oaks and there was some pine timber at one time but most of it had been cut down; the timber is sparce all over the canon by reason of its having been cut down; you don't see any timber to amount to much until you get up towards the backbone and there, there is some timber; the size of the stumps is from a foot to 2 feet; there may be a few more than two
936 feet.

Q. I will ask you from your connection with the United States Geological Survey and the duties that you say you have performed in reference to the seggregation and designation of lands, if you were seggregating and designating officially the land over which the timber was cut on Rock Creek Canon, would you or would you not designate it as non-mineral lands?

Objection; sustained; exception.

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Witness: I would like to make a statement before I go. In the examining and seggregating of mineral lands, I do not definitely designate it myself; the request comes from the Director of the Geological Survey who sends

someone out to examine upon the character of the lands; I report from my examination to him, so I myself, don't designate these lands but it is only on my report that they 938
are designated as mineral or not as the case may be.

CROSS EXAMINATION.

The Director of the United States Geological Survey drew my attention to this matter first; his name is Charles F. Walcott; at Washington. I was in Washington at the time; I did not have a consultation with the officers of the land office; I have had no conversation with them in reference this survey and my action; I have had no 939
conversation at all with any officers of the land office, except that I went into the Surveyor General's office and asked to see the plats of certain townships; I have a letter from the Director of the Geological asking me to examine certain lands in Arizona; they are not designated; I have not a letter of instruction from him in relation to my examination of the land in Rock Creek; those instructions were oral in Washington; I received a letter last summer when I was at the Yellowstone National Park asking me to examine certain land in Arizona previously designated 940
to me; I did this subsequent to coming to this Territory; these oral instructions were to examine the lands in Rock Creek; I have made no examination of lands in Arizona, of mineral or non-mineral lands, except these; this was my first experience in Arizona; I have been connected with this Geological Survey fourteen years; I was not sent out here expressly to examine Rock Creek; my oral instruction from the Director was to examine the lands in those unsurveyed townships in order to show what would be occupied by townships 17 and 18 south, range 30 east, if surveyed. 941
Those townships are shown on this map; I examined them; I have not examined mines individually and outside of my duties as an assistant to the Geological Survey; we are not allowed to examine for private parties; since 1895, I have

examined a great number of mining districts and have examined the mines in detail and have been down in shafts
942 and have examined drifts and taken samples from them and have examined them in a thorough way as to the character of the mineral deposits and the value.

The purpose for which I have been surveying and examining is to prepare a report upon the character of these mines as to guide the miners, as much as possible, by informing them of what has been found and what has not been found and of what value that is which has been found; when I testified that a hard white quartz showed
943 no mineral deposits I meant that, as a result of my personal examination of the quartz, I saw no valuable mineral in it nor any appearance of valuable mineral in it; the samples that I made that statement of were taken right from the surface; in some places where there were holes dug, of course, they came from two or three feet below the surface; I don't say that the rock had no mineral value in it, but I say, from my personal examination of it. I did not find any valuable mineral in it; I made no examination of any rock below the surface; I am speaking of the particular samples.

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As to there being valuable mineral deposits on Rock Creek, I just say that in the first place there are none because there is no color on or in Rock Creek, where I examined, that shows colors and there are no important gold deposits in the Creek; Rock Creek had been washed and the float and dirt carried away for ages and the particles have been carried down the creek and everything that was of value has been concentrated in that creek; and in those ravines and I examined them and found nothing; conse-
945 quently, I say that there is nothing there on Rock Creek in the way of deposits; I examined the riffles in the creek and examined the ravines; I examined the riffles about 200 feet; I don't know how long that canon is; 6 or 7 miles I should judge; the place I examined was about three miles

from the top of the mountain; I say there are no valuable gold deposits on Rock Creek; I don't mean to include in my statement anything below the point 946
where I saw it; Rock Creek goes below that but we have been speaking only of Rock Creek above the lower mill setting;I can't and don't pretend to say what is in Rock Creek below that point; I havn't been there; I am not sure that Prof. Blake and Prof. Ricketts made their inspection at the same parts of the ledges that I did; I don't know anything except the location I saw personally; it would not be taking a fair sample of a ledge to take a chipping in one place on a ledge, 75 to 100 feet in length, in an area of 2 or 3 feet, if the facts were as you 947
state them. But the fact is that on Pine Creek, I saw the whole width of the ledge exposed in the creek, and I chipped pieces all along that and the sample represents the value of the ledge right straight across; now, then, above that I didn't sample it across the whole width because I thought I would obtain a more favorable assay if I only picked those which seemed to be the most iron stained and the heaviest and that seemed to contain the most iron; where I sampled at Pine Creek was in the Creek bed, where the storms have cut out gulches; and then a little 948
distance down there is the main gulch; it was on the north side of the canon; on the right hand side of the canon as you go down, right at the mill; right where that gray or brown rock is; I took my pick and chipped rock off there to make a mineral test of the ground and it was the chippings that I took at this point that I sent to be assayed; it is certainly upon such tests that I base my opinion of the non-mineral character of the lands; I sampled the ledge across as any miner would; of course there was a ledge; I thought you under 949
stood that from my description; there is a ledge there that crops out on the bluff between the two creeks and is again exposed just below the mill pit; by the action of the creek; I regard that as the same ledge that appears on the bluff

just above the mill and I took the sample there because there was an excellent exposure of the whole width; could
950 take a good average across, which I did; all of it was exceedingly soft rock at that point; there might have been some hard with the soft but most of it was soft; along that ten feet I went across, it was just as soft as it was on the hill and a little softer if anything; but that farther up was very hard, most of it; hard iron rock; it was more than ten feet; I may have said in my direct examination that it was about ten feet; it may have been 15 probably; 10 is the minimum.

The sampling which I made of the rock on the creek
951 bed in Pine Canon is a fair illustration of the method and sampling which I have made elsewhere in my investigation of the character of the Territory in Rock Creek Canon and vicinity. I gave the instructions in relation to the making of the topography of this map.

Q. State why and under whose directions you acted in limiting the showing of Rock Creek Canon on this map?

Objection; immaterial; overruled; exception.

952 I have limited it in that way because my instructions were for an examination of townships 17 and 18 south, range 30 east and nothing more; I have not shown the topography of 18 south 29 east on my map, except along the creek there, where the traverse line of Mr. Gerdine was run, where the stadia lines of Gerdine were run; otherwise not; it was not requested of me in my instructions to show the topography west of there; those instructions were given to me by the Director of the Geological Survey; I had no such instruc-
953 tions; that township was never mentioned in my instructions; the only two townships that were mentioned were townships 17 and 18 south range 30 east; I have shown a part of Rock Creek in township 18 south range 29 east because it was immediately adjacent

to the land cut over and some of the specimens came from there and was near the line of the township I was in; that township was not mentioned in my instructions; my in- 954
structions did not call for that; I may have exceeded my instructions but the instructions did not say I might not do it; the instructions did not mention anything about it; the Government gave me no instructions in regard to that township; I may have exceeded my instructions, technically; I have exceeded my instructions; my instructions did not call for that; I was instructed to examine township 17 south range 30 east; my instructions were confined to Tps. 17 and 18 south range 30 east; it is not a fact that, if I have exceeded my instructions, I did so to gratify the 955
attorneys in this case; it is not a fact that I have exceeded my instructions in order to furnish additional information to the attorneys in this case; if at all I exceeded them in favor of the defendant because I examined more ore deposits than was demanded; I have not seen a large copper mine both before and after it has been developed; nor in so far as you mean that I have been to any place and seen the surface ground in that place subsequently, a large mine having been developed; I found no considerable body of limestone in Rock Creek; if I had found large bodies of 956
limestone in Rock Creek, in association with the other rocks, and if that rock contained mineral, it would have modified my opinion; if I had found mineral in notable quantities in vicinity of such formation of course it would have modified my opinion; I have not placed any limestone on this map; I have not marked anything on that map to indicate the presence of limestone; I saw no limestone on Rock Creek; I stated that the Rock Creek were lave flows: (Witness looks at rocks shown him) I think they are rocks of the character of lava flow that I have described in Rock Creek; they are both of lava flows; they are all 957
three of them, yes sir; these two are related to each other; this one is rhyolite; where it comes from, I don't know; the one of the pinkish or reddish color is rhyolite, as far

as I can see; this piece of rock is of the character of lava
flow I found in Rock Creek; I rather think I have seen
958 some that looks like that; it is related more or less in the
character to those two pieces you have shown me; those
three pieces that lie there together are rather chrystaline
in character; they are from the lava flows I have describ-
ed; the evidence of that is quite as plain in Rock Creek;
in Morse's canon what might be the same rock is there
shown abundantly on the east side of the mountain and
there it is conclusively shown that the rock is lava, is a
flow; I admit that it doesn't look like that but it is; I say
that rock of which these pieces are characteristic are prop-
959 erly known as lava; the popular definition of lava is talc
which shows evidence of having been molten; I should say
none of those are of the character of lava, in its popular
signification; by a lava flow, I mean a flow which was
forced up through the earth's crust and spread out on its
surface in thick or thin layers; that pinkish rock I said was
rhyolite probably; from my casual inspection, I should say
it is rhyolite; I have colored that on my map in yellow; I
have colored pink on my map a rock which appear some-
what similar to those three specimens you have showed
960 me here; I have colored that pink.

That is all.

Mr. Bennett: Plaintiff rests.

It is stipulated that the map offered and admitted by defendant and the map offered and admitted by plaintiff, both in evidence shall be a part of this record and as so considered.

Mr. Bennett: We now make a motion herein that the
Court instruct the jury herein to find, on the evidence,
961 adduced, a verdict for the Government.

The Court: I cannot but feel that the granting of this motion would involve refusing the right of the defendant to have the question of fact in this case submitted

to the jury, therefore plaintiff's motion to instruct the jury to find a verdict for plaintiff on the evidence adduced will be denied. 962

Exception.

By the Court: Gentlemen of the jury: You are instructed that by the law by which you must be governed in this case, is contained solely in the instructions and charge of the Court. You will give no weight to or consideration to the opinion of the counsel as to what they may think the law should be, nor to the alleged opinions of other courts, in other cases, where the same conflicts with the instructions as given you in this case. 963

This is a suit brought by the United States of America, against the defendant, Copper Queen Consolidated Mining Company, a corporation, to recover the sum of $183,070.50, alleged to have accrued to plaintiff by reason of the defendant having cut, caused to be cut and removed and having taken, used and consumed from the Public Lands of plaintiff, 5.905,500 feet of timber; it has been admitted by the defendant that one Daniel D. Ross did cut, cause to be cut, and remove from plaintiff's lands, the said 5,905,500 feet of timber and 964 that the value of such timber was the sum of $183,070.50. it at said place in mining operations.

It is further admitted by the defendant that said timber was purchased by it from said Ross, at the town of Bisbee, Arizona and the same was used and consumed by it at such place in mining operations.

The trees and timber growing on all public lands in this Territory, belong to and are the property of the United States and damages may be recovered by a proper action against any person or corporation who cuts or causes 965 to be cut and removed, or who purchases and uses such timber, without license or authority from the United States.

The defendant in this action, as an excuse or justification for the admitted cutting, removal, purchase and
966 use of the timber described in the complaint, pleads in its answer that Deniel D. Ross cut and removed such timber and that the Copper Queen Consolidated Mining Company purchased and used the same under the authority of an Act of Congress, passed June 3rd, 1878, which with certain limtations, permits, authorizes the cutting and removal from public lands of the United States, providing such lands are mineral in their character and which said Act is as follows:

"All citizens of the United States and other persons,
967 bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana and all other mineral districts of the United States, shall be, and are hereby authorized and permitted to fell and remove, for building, agricultural, mining or other domestic purposes, any timber or other trees, growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states territories or districts of which such citizen or persons may be at the time bona fide residents, subject to such rules and regulations as the Secre-
968 tary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes."

The purchase and consumption of said timber, having been admitted by the defendant as heretofore stated, and the defendant having rested its defense to this action upon the authority or license to cut, remove and consume such timber granted by the United States, by virtue of the Act of June 3rd, 1878, it is therefore incumbent upon the defendant, in order to avail itself of the permission granted by said Act and in order to justify its purchase and con-
969 sumption of said timber, to establish by a preponderance of the evidence that the lands from which said timber was removed were mineral in character within the meaning of this Act, and unless you are satisfied by a preponderance

of the evidence, that said lands were mineral, you will find for the plaintiff.

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It is also incumbent upon the defendant, in order to avail itself of the permission granted by said Act of June 3rd, 1878, and in order to justify its purchase and consumption of said timber, to show by a preponderance of the evidence that Daniel D. Ross, at the time of the cutting and removal of said timber from the lands of the plaintiff was a citizen of the United States and was a bona fide resident of the Territory of Arizona. And should the evidence in this case fail to establish that at the time of the cutting and removal of said timber the said Daniel D. Ross was a citizen of the United States and a bona fide resident of the Territory of Arizona, you must find for the plaintiff, without regard to the mineral or non-mineral character of the land.

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You are instructed that the words used in the Act of June 3rd, 1878, Statutes of the United States, "lands being mineral," is land that it will pay to mine by the usual modes of mining and which are not subject to entry except for mineral entry, and this is a proper rule for you to apply in determining whether the lands from which the timber has been cut is in fact mineral land.

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You are instructed that all citizens of the United States, and other persons bona fide residents of the Territory of Arizona, are expressly authorized and permitted to fell and remove, for building, mining, agricultural and other domestic purposes, any timber or other trees growing or being upon the public lands of the United States, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry, in said territory or districts of which such citizens or persons may be at the time bona fide residents and the jury are instructed that the corporation defendant in this case is included in the term "persons" in this instruction. The word "persons" includes both individuals and corpo-

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rations and no distinction can be made between the rights of any individual and a corporation in respect to
974 such matters.

The jury is instructed that the public lands of the United States in Arizona are divided into two classes; one class is known as mineral lands and the other class is known as agricultural lands; these are the only two classes of public lands which we have in this Territory, or which can be considered in this action. The purposes for which timber may be cut from or upon public mineral lands are building, agricultural, mining and other domestic purposes.
975 The words "domestic purposes" as used in this statute mean local purposes, that is, for use by persons who reside in the state or territory in which the timber is cut; the word domestic is used in contradistinction to the word "foreign" and it is meant that persons who live in the state or territory in which the timber is growing may have the use and benefit of the timber which is grown upon the public lands of the United States in that state or territory so long as it is used and devoted to the uses by the persons who reside therein and so long as it is so used, it is a do-
976 mestic use within the meaning of the Act.

If you find from the evidence that the defendant used and consumed in its mining business, timber which was cut from public lands of the United States, not subject to entry under the existing laws of the United States except for mineral entry and that said timber was cut and used for mining or other domestic purposes within this Territory by a bona fide resident thereof, you are instructed that said timber so used and consumed was not the property of the United States and the plaintiff cannot re-
977 cover therefor, and your verdict in that case must be for the defendant.

All of the instructions given you are to be considered together and the preceding instruction requested by the

defendant is given, conditioned that you must also find that Daniel D. Ross was, at the time of the cutting, a citizen of the United States.

You are instructed that if you find from the evidence that in the portion of the lands from which the timber was cut, there are small parcels of land upon which no ledges or other indication of mineral appears, and which is of agricultural character, this does not affect the right to cut and remove the timber therefrom, if you find further that the general character of the land is mineral, and that the portion of the mountains within which the timber was cut in a mineral district.

If you find from the evidence that one Daniel D. Ross cut timber from the public lands of the United States and sold said timber to the defendant, I charge you that if you also find from the evidence that said timber was lawfully cut under the authority of an Act of Congress, permitting the cutting of timber from public mineral lands of the United States, and that defendant was a bona fide resident of Arizona and used said timber for mining or other domestic purposes in said territory, the plaintiff cannot recover and you verdict must be for the defendant.

In other words, unless the cutting of the timber was unlawful, the defendant is not liable to plaintiff for purchasing and using said timber, provided that defendant used the same for mining or other domestic purposes in this Territory and was at the time a bona fide resident thereof.

Proof of the existence of some measure of minerals in the lands from which the timber was cut, or proof of traces, indications or possibilities that said land contained valuable mineral deposits, or that the lands in question are high, rugged, rough and precipitious can not in itself impress said lands with a mineral character; mineral in sufficient quantities to justify exploration and develop-

ment and in quantities which it will pay to work, must be shown, to exist, and the existence
982 thereof in the land must be demonstrated as a present fact, in order to justify the cutting of timber therefrom; or the purchase of such timber after being cut under the Act of June 3rd, 1878.

The mere fact that portions of the land from which the timber was cut contained particles of gold or other valuable mineral deposits or veins of gold bearing quartz, would not necessarily impress it with the character of mineral land as herein defined and within the meaning of the
983 Act of June 3rd, 1878. It must at least be shown that said lands contained metals in quantities sufficient to render it available and valuable for mining purposes.

The fact of cutting timber on unsurveyed government land or on government land not designated as mineral, being either admitted by defendant or proven to your satisfaction by a preponderance of the evidence, it devolves on defendant to show by a preponderance of evidence that the land on which the cutting was done was in fact valuable for mineral as above defined; that is, that
984 it is such mineral land as will pay to mine and work by the usual modes of mining.

You are further instructed that the existence of mineral in the lands and the existence of ledges bearing small amount of mineral, does not in the law justify or excuse the cutting, unless the mineral be in such quantities or the ledges carry such amount of mineral as will pay to work it by the usual methods of mining.

You are further instructed that if you believe from
985 a preponderance of the evidence in this case that Daniel D. Ross cut or caused to be cut the timber described in the complaint, from public lands of the United States and that at he time of the said cutting or causing to be cut, the said Daniel D. Ross did so with knowledge that the

said lands were not mineral lands as herein defined, or that said Ross so cut or caused to be cut said timber from said lands, not knowing whether said lands were mineral 986
lands or not, and without diligent examination and investigation of said lands, to determine the character thereof; and you further believe from the evidence in this case that said lands were at the time of said cutting, non-mineral lands, and that the defendant, the Copper Queen Consolidated Mining Company purchased said timber from said Ross, then your verdict must be in favor of the plaintiff herein; and the damages to be assessed in your verdict must be the value of said timber at the place of delivery.

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You are instructed that unless you find from a preponderance of the evidence that the lands from which said timber was cut were mineral lands as herein defined, within the meaning of the Act of June 3rd, 1878, then the timber at all times before and after it was cut, was the property of plaintiff; its purchase by the defendant corporation did not divest the title nor the right of possession of plaintiff; the recovery of any sum whatever is based upon this proposition. And by the purchase of the timber from Daniel D. Ross, the defendant corporation did not acquire any better title to the property than the said Ross had. 988

The jury are instructed that so far as plaintiff's right of recovery is concerned, it does not depend upon the value of the land for agricultural or any purpose other than mineral. The plaintiff is not bound to show the land of any value but the defendant is bound to show by a preponderance of the evidence that the land is mineral land, as heretofore explained and defined in these instructions, and unless they so show, you must find for the 989
plaintiff.

I charge you that one who goes upon the public lands of the United States and cuts and removes timber there-

from, is charged with the knowledge of the character of such lands, and he so cuts and removes said timber at his
990 peril and if said public lands are not in fact mineral he is a willful trespasser and one who purchases such timber so cut as aforesaid, from such willful trespasser is likewise liable for the full value of such timber at the place of delivery, without reference to the amount paid therefor.

The jury are instructed that the defendant must show by a preponderance of the evidence, that the land from which the said timber was cut, taken as a whole, was valuable for the mineral it contained, at the time of the said cutting and this fact is not established by proof of
991 the character of adjoining land; the land itself, from which the timber was taken, must be shown, in fact, to be valuable for mineral.

You are further instructed that the rule of damages, should you find for the plaintiff, is as follows:

If Daniel D. Ross, in cutting and removing the timber, was a willful trespasser, as heretofore defined in these instructions, then the defendant is liable to the plaintiff in the full value of the manufactured timber at the place
992 of delivery.

An innocent trespasser is one who cuts timber, believing in good faith, and having good and sufficient reason for such belief, that he had a right to cut the same when, under he law, he had no real right to do so. If, however, the trespasser did not use all reasonable diligence and exercise every reasonable precaution to ascertain the character of the land from which the timber was cut, before cutting same, he cannot be considered an innocent trespasser.

993 An innocent trespasser, as above defined, is still liable for the value of the timber, less the labor and expense he places thereon, or, in other words, stumpage value, and a purchaser from such innocent trespasser is likewise liable.

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The jury are instructed that lands open for entry not valuable for mineral as defined in these instructions, and chiefly valuable for the timber that may be growing upon 994
the same and upon which there is more or less grazing, may be properly entered as an agricultural entry under the Homestead Law of the United States and the entryman can thus avail himself of the timber.

You are instructed that in arriving at a verdict in this case, you are to consider all the evidence given on the trial but you shall not regard in any way the or any statements contained in questions asked by respective counsel, where said questions were objected to and the objections sustained. Nor shall you pay any attention to statements 995
made by counsel in offers of testimony where such offers were objected to and such offers refused by the court, or where questions are answered and the answers thereto and such answers were stricken from the record.

By a preponderance of the evidence is meant the greater weight of the evidence and, in determining upon which side the preponderance of the evidence is, you should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; the conduct or demeanor while testi- 996
fying; their interest or lack of interest, if any, in the result of the trial; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proven on the trial; and from all of these facts and circumstances determine upon which side is the weight or preponderance of the evidence.

I have prepared for your convenience two forms of verdicts, one reading "United States of America, Plaintiff, against Copper Queen Consolidated Mining Company, a 997
corporation, defendant. We the jury duly impaneled and sworn in the above cause, upon our oaths do find, upon the issues joined, for the plaintiff and assess its damages at blank dollars." The other: "United States of

America plaintiff, against Copper Queen Consolidated,
Mining Company, a corporation, defendant. We the jury
998 duly impaneled and sworn in the above cause, upon our
oaths do find the issues joined, for the defendant."

When you have agreed upon a verdict, you will have one of your number sign it as foreman and return it into Court.

And thereafter at 4:32 P. M. of the same day, the jury returned into Court the following verdict:

"In the District Court of the First Judicial District
999 of the Territory of Arizona, having and exercising the
same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.

UNITED STATES OF AMERICA, Plaintiff.
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY, A CORPORATION, Defendant.

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We the jury duly impaneled and sworn in the above entitled cause, upon our oaths do find upon the issues joined, for the defendant.

J. KNOX CORBETT,
Foreman."

Be it remembered that heretofore, on this same 9th day of June, 1898, the verdict of the jury in said cause having been heretofore returned and recorded, it is now
1001 by the Court ordered, adjudged and decreed, that said defendant, Copper Queen Consolidated Mining Company, a corporation, do have and recover from and aginst said plaintiff United States of America judgment upon the issues joined in this action.

And thereupon judgment was duly entered in accordance with the above order, and is as follows to-wit:

1002

UNITED STATES OF AMERICA, Plaintiff.	NO. B. 41.
vs.	Judgment on Verdict in open Court.
COPPER QUEEN CONSOLIDATED MINING COMPANY, A CORPORATION, Defendant.	June 8th, 1898.

1003

This action came on regularly for trial. The said parties appeared by their attorneys, Robert E. Morrison, E. E. Ellinwood and Thomas Bennett, Esqs., counsel for plaintiff, and William Herring and Sarah I. Herring, for defendant.

A jury of twelve persons was regularly empanneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retire to consider of their verdict, and subsequently return into Court, and, being called, answered to their names, and say:

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"United States of America.

"In the District Court of the First Judicial District "of the Territory of Arizona, having and exercising the "same jurisdiction under the Constitution and Laws of "the United States as is vested in the District and Circuit "Courts of the United States.

1005

"UNITED STATES OF AMERI-
"CA, Plaintif,
1006 vs. "NO. B. 41.
"COPPER QUEEN CONSOLI-
" DATED MINING COMPANY,
" A CORPORATION, Defendant.

"We, the jury impanneled and sworn in the above "entitled cause, upon our oaths do find upon the issued "joined, for the defendant.

" J. KNOX CORBETT,
" Foreman."

Wherefore, by virtue of the law, and by reason of the
1007 premises aforesaid, it is ordered, adjudged and decreed that said defendant Copper Queen Consolidated Mining Company, a corporation, have and recover from and against said plaintiff, United States of America, judgment upon the issues joined in this action.

GEORGE R. DAVIS,
Judge.

Judgment recorded the 10th day of June, 1898. Book Judgments, Pages 1 & 2.

1008 MOTION FOR A NEW TRIAL.

Be it remembered that on the said 9th day of June, 1898, the said plaintiff filed its motion to set aside the verdict of the jury heretofore entered, to set aside the judgment entered in favor of defendant upon said verdict, and to grant a new trial, which said motion is as follows:

"Comes now the plaintiff and respectfully moves the Court to set aside the verdict of the jury entered and filed herein on the 8th day of June, 1898, and set aside the judgment in this cause, for the following reasons, to-wit:

1009 I.

That the Court erred in admitting evidence in behalf of defendant over the objection of plaintiff and in refusing to admit evidence offered by plaintiff.

II.

That the Court erred in refusing instructions requested by plaintiff and in granting instructions requested by defendant. 1010

III.

That the evidence does not sustain the verdict.

IV.

That the verdict is contrary to the law and the evidence.

V. 1011

That the jury in returning said verdict, were guilty of misconduct in the consideration thereof, in this: That said jury, after having retired from the Courtroom, on the said 8th day of June, 1898, and after having received the charge and instructions of this Court and while in the jury room and considering of said verdict, listened to, received and considered certain testimony from certain members of said jury, upon material facts in this cause and did base said verdict upon said testimony and did accept such testimony 1012 as conclusive. That said testimony was given by certain members of said jury to the other members thereof and concerned material facts for the establishment of which no testimony or evidence whatsoever had been introduced or received in the trial of said cause, in a proper manner.

That without the establishment of the facts testified to in a due, proper and legal manner, no verdict could legally be found or rendered for defendant.

That the conduct of said jury in listening to, considering or giving any weight to the statements of fact made 1013 in the jury room, was contrary to the instructions of this Court and the legal and orderly method in such case made and provided.

Wherefore plaintiff prays that its said motion be granted, that said verdict be set aside and the judgment
1014 in this case arrested and that it be granted a new trial.

And thereafter, to-wit: On the first day of July, 1898, the said motion for a new trial was by the Court overruled, the order overruling the said motion being as follows:

"Upon the 29th day of June, 1898, the same being one of the days of the regular March, 1898, term of said court, comes on for hearing the motion to set aside the verdict and judgment and for a new trial, filed herein by
1015 plaintiff on the 9th day of June, 1898 and the motion having been fully argued by the counsel for the respective parties herto and the Court being fully advised in the premses, on the 1st day of July, 1898, overrules and denies said motion for a new trial.

Exception.

When the Court decided the motion for a new trial, overruling the same, he used the following language:

The motion for a new trial in this case is based upon five different grounds. The argument, however, has been
1016 mainly, if not entirely, directed to the two grounds:

That the evidence does not sustain the verdict; and

That the verdict is contrary to the law and the evidence.

The points discussed under these grounds are practically but two:

1. Whether there has been any evidence tending to show that the lands from which the timber was cut were "mineral," within the meaning of the license Act of June
1017 3, 1878, and

2. Whether the legality of the verdict depends upon the citizenship of Daniel D. Ross, and if so, has there been any proof of such citizenship?

Upon the first proposition the Court is satisfied that in the great volume of testimony upon this point, there was fairly a conflict of evidence, and the jury, under our 1018
system being the sole judges of the weight of the evidence having apparently considered and settled the fact in favor of the mineral character of the land, the Court would be overstepping its province to disturb the finding upon this point.

In its charge to the jury on the trial of this case the Court gave the following instruction:

"It is also incumbent upon the defendant, in order to avail itself of the permission granted by said Act of June 1019
3, 1878, and in order to justify its purchase and consumption of said timber, to show by a preponderance of the evidence that Daniel D. Ross, at the time of the cutting and removal of the said timber from the lands of the plaintiff, was a citizen of the United States, and was a bona fide resident of the Territory of Arizona; and should the evidence in this case fail to establish that at the time of the cutting and removal of said timber the said Daniel D. Ross was a citizen of the United States, and a bona fide resident of the Territory of Arizona, you must find for the plaintiff, without re- 1020
gard to the mineral or non-mineral character of the lands."

At the time it was given the Court believed this instruction to be a true expression of the law applicable to the case, under the pleadings. Its correctness has been seriously, and as I know, in good faith disputed, and some authorities have since been brought to my attention which could reasonably cause doubt as to whether this instruction standing alone is really sound in law. It was framed upon one construction of the Act of June 3, 1878, which pro- 1021
vides that "All citizens of the United States and other persons, bona fide residents of the States of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyo-

ming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, au-
1022 thorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States, except for mineral entry, in either of said states, or districts of which such citizens or persons may be at the time bona fide residents.

It has been my theory, taking notice of what is common knowledge with respect to legislation, that the words
1023 "other persons," as here used, were intended to mean and include only artificial persons, or corporations; that in the face of well known and existing prejudices, an Act, such as the one in question, could more readily become law containing the words "and other persons" in the connection used than if the words "and corporations" were inserted. For the proper construction of the words "and other persons," counsel for defendant invoke the well recognized rule that significance and effect should be given, if possible, to every word and clause of the legislative Act. It might
1024 also and with good reason, be claimed that the application of this rule would give some effect to the words "all citizens of the United States," which under the construction insisted upon by the defendant, have absolutely no significance, whatever, for the statute would have the very meaning imputed by the defendant without these words. Judge Deady in the Smith case manifestly treats these words as surplusage,and makes the observation that "this Act is very loosely and unskillfully drawn, and abounds in unnecessary and indefinite phrases and clauses of the and-so-forth
1025 character." I confess that I could feel more confidence in this instruction as to citizenship, if the Government's case were proceeding under different pleadings, against, and solely against, Daniel D. Ross. The complaint here charges that the defendant, Copper Queen Consolidated Mining

Co., cut and caused to be cut and removed the timber therein referred to. The answer expressly denies that the company cut or removed, or caused to be cut or removed, 1026
the said timber or any part thereof. Here was one of the issues presented to the jury by the pleadings for their determination and there was unquestionably some evidence upon each side of it. There was also ample evidence to justify the jury in concluding that the Copper Queen Co., was a person entitled to cut and remove the imber and that it was used for the purposes mentioned in the Act.

There have been several trials of this case and it has been expensive litigation, alike to the government and the defendant. If the verdict were to be set aside that action 1027
would, in the Court's view have to be based solely upon the failure of the evidence to show that Daniel D. Ross, who is alleged by the answer to have cut the timber, was a citizen of the United States. In view of the doubt created by the authorities as to whether this is a material allegation, and considering its uncertain bearing upon the issues presented under the peculiar state of these pleadings, I do not feel justified, under the law, in disturbing the verdict rendered, without permitting the appellate court to pass upon the legal question in controversy. 1028

The motion, will, therefore, be denied.

NOTICE OF APPEAL.

And thereupon and thereafter on said first day of July 1898, the said plaintiff, in open Court, gives notice of appeal to the Supreme Court of the Territory of Arizona, from the verdict and judgment found and entered herein and also from the order of the Court denying a new trial herein.

And on motion of plaintiff, on this said first day of 1029
July 1898, it was ordered that the plaintiff have thirty days from and after the close of the present March term of this court within which to prepare and file a statement of facts

herein and it is further ordered that the plaintiff do have
1030 twenty days from and after the close of said March term of this Court, within which to prepare and file a bill of exceptions in this case.

And be it remembered that on the 14th day of October, 1898, on motion of Robert E. Morrison, United States Attorney, the following order was made and entered of record:

It is hereby ordered that the statement of facts and bill of exceptions to be hereafter filed in this cause, shall, when so filed, be registered and filed by the Clerk of this
1031 Court as of date of September 10th, 1898, agreeable to the stipulation of the respective parties hereto, filed this day.

The stipulation mentioned in the foregoing order and which was duly filed on the 14th day of October, 1898, is as follows, omitting title of court and cause:

Whereas, the estimate of W. W. Weed, official Court Stenographer of the First Judicial District of the Territory of Arizona, has placed the time in which the transcript of the above entitled cause can be reduced to writing and filed in this Court, at at least ninety days from the
1032 date hereof; and

Whereas: Said record is voluminous and it has been conceded by respective counsel, that the bill of exceptions and statement of facts cannot be compiled by counsel for plaintiff and appellant within the short time intervening between the completion of the transcript and the opening of the Supreme Court of the Territory of Arizona at the January term thereof, 1899;

Now therefore, it is hereby stipulated and agreed by
1033 and between the respective attorneys of record, that the time for appeal to be hereafter perfected in this cause is extended, and it is understood and agreed that said cause will not be heard in the Supreme Court of the Territory of Arizona, and will not be presented there for determina-

tion, until the January term of said Supreme Court in the year 1900.

1034 That plaintiff and appellant have until the 15th day of February, 1899, to file its statement of facts and bill of exceptions in the said First Judicial District Court.

Provided, that in case, by reason of unavoidable accident or delay the transcript of the record in this case shall not be completed by the official stenographer before the first day of January 1899, counsel for defendant and appellee will not insist that said bill of exceptions and statement of facts shall be presented to the Court for approval by the said 15th day of February, 1899, and if it 1035 shall appear that, notwithstanding reasonable diligence on the part of counsel for plaintiff and appellant, it will then have been impossible to camplete said statement of facts and bill of exceptions, a further extension of time for such purpose shall then be made as may be agreed upon.

The plaintiff and appellant shall have until the 15th day of April 1899, within which to file its brief in the Supreme Court of the Territory of Arizona, and that thereafter, defendant and appellee shall have until the first day of 1036 September, 1899, to file its brief in the Supreme Court of the Territory of Arizona; that thereafter plaintiff and appellant shall have until the first day of November, 1899, to file its reply brief to defendant and appellee's brief.

Both of the respective parties hereto waive the statutory requirements as to the time for the perfection of appeal, filing statement of facts and bill of exceptions, and briefs and hereby request that this stipulation be entered in the Supreme Court of the Territory of Arizona as a part of the record on appeal herein and the said statement of facts and bill of exceptions, when filed in the lower Court, 1037 agreeble to this stipulation shall be filed as of the 10th day of September, 1898, and so filed and registered by the Clerk of said Court.

In witness whereof, William Herring, Esq., for appellee and the United States of America by Robert E. Morrison Esq., and Thomas D. Bennett, Esq., its attorneys, have made and entered into this stipulation and agreement and have caused the same to be filed as a part of the record in the above entitled cause, this 14th day of October, A. D. 1898.

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WILLIAM HERRING,
Attorney for Appellee.

ROBT. E. MORRISON,
THOS D. BENNETT,
Attorneys for Appellant.

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And be it further remembered, that at the conclusion of the taking of the testimony in the above entitled cause, the plaintiff asked that the Court give the following instructions, which the said Court then and there refused to give:

This is a suit brought by the United States of America against the defendant Copper Queen Consolidated Mining Company, a corporation, to recover the sum of $183,070.50, alleged to have accrued to plaintiff by reason of the defend-

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ant's having cut, caused to be cut and removed and having taken, used and consumed from the public lands of the plaintiff, 5,905,500 feet of timber. It has been admitted by the defendant that one Daniel D. Ross did cut, cause to be cut and did remove from the plaintiff's lands the said 5,905,500 feet of timber and that the value of such timber at Bisbee, Arizona, was the sum of $183,070.50; it is further admitted by the defendant that said timber was purchased by it from said Ross at the town of Bisbee, Arizona, and the same was used and consumed by it at said place in

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mining operations.

The trees and timber growing on all public lands in this territory belong to and are the property of the United States and damages may be recovered by a proper action

against any person or corporation who cuts or causes to be cut and removed or who purchases and uses such timber, without license from the United States. 1042

The defendant in this action, as an excuse or justification for the admitted cutting, removal, purchase and use of the timber described in the complaint, pleads in its answer that Daniel D. Ross cut and removed said timber and that the Copper Queen Consolidated Mining Company purchased and used the same, under authority of an Act of Congress, passed June 3rd, 1878, which, with certain limitations, authorizes the cutting and removal from the public lands of the United States, providing said lands are mineral in their character and which said Act is as follows: 1043

"All citizens of the United States and other persons bona fide residents of the State of Colorado, or Nevada, or the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and in all other mineral districts of the United States, shall be, and hereby are authorized and permitted to fell and remove, for building, agricultural, mining and other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States, except for mineral entry, 1044 in either of said states, territories or districts of which such persons or citizens may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and the undergrowth growing upon said lands and for other purposes."

You are further instructed that by virtue of said Act and pursuant to the authority therein imposed, the Secretary of the Interior thereafter prescribed certain rules and regulations, which thereupon became laws of the same 1045 force and effect as the statute itself. That portion of the said regulations to which the defendant must conform in order to justify under the license granted by the statute,

and which is applicable to the facts in this case, is found in the first, second and third paragraphs of said regula-
1046 tions and is as follows:

"1st. The Act applies only to the states of Colorado and Nevada and to the territories of New Mexico, Arizona, Utah, Wyoming, Idaho and Montana and other mineral districts of the United States not specially provided for;

2nd. The land from which timber is felled or removed must be known to be of strictly mineral character and that it is not subject to entry under the existing laws of the United States except for mineral entry.

1047 3rd. No person, not a citizen or bona fide resident of a state, territory or other mineral district provided for in said Act, is permitted to fell or remove timber from mineral lands therein. And no persons, firm or corporation felling or removing timber under this act, shall sell or dispose of the same or the lumber manufactured therefrom, to any other person than citizens and bona fide residents of the state or territory where such timber is cut, nor for any other purpose than the legitimate use of said purchaser for the purposes mentioned in said act."

1048 In this case it is incumbent upon the defendant to establish by a preponderance of the evidence that the lands from which said timber was cut, was valuable for the mineral it contained and in order to establish that land is valuable for mineral, it must be shown that the value per ton of the mineral, in some degree, exceeds the usual and economical cost of mining said mineral per ton.

No. 4½.

You are instructed that the defendant must prove by
1049 a preponderance of the evidence that the lands from which the timber is cut are more valuable for the mineral therein, than for any other purpose and that they are not suitable for agricultural purposes, grazing or cultivation or valuable solely for the timber thereon.

No. IX.

Evidence of the location of mining claims immediately contiguous or closely associated with the lands from which the timber was cut, in itself, is no proof of the mineral character of the land in question. 1050

No. XI.

The liability of the defendant to plaintiff for the full value of the timber delivered at Bisbee, Arizona, does not depend upon whether Daniel D. Ross was or was not an agent of the said company, at the time said timber was cut and delivered. Defendant, by virtue of its purchase from Ross, stands in the same position that he did, and if you find from the evidence that Ross cut said timber from said land, without positive knowledge that it was mineral in character, as herein defined, then the defendant would be equally liable with said Ross, without regard to the price paid by defendant for said timber. 1051

No. XII.

Section 2 of the Rules and Regulations of the Secretary of the Interior prescribes that "the land from which timber is felled or removed must be known to be of a strictly mineral character and not subject to entry under existing laws of the United States, except for mineral entry" and unless you believe from the evidence that the lands were, by Daniel D. Ross, known to be of a strictly mineral character, at the time of the cutting, you must find for the plaintiff. Knowledge that the lands were mineral cannot be inferred from mere traces, indications or stains of mineral or possiblities that mineral may exist, but in order to justify the cutting, the lands must be proven to be mineral lands as herein defined. 1052 1053

No. XIII.

1054 The burden of proof in this case is upon the defendant to show by a preponderance of the evidence that the land from which the timber was cut was valuable for mineral and I charge you that it is wholly immaterial whether said lands were of the least value or any value whatever, for agriculture, grazing or any other purpose. It must be shown by the defendant by a preponderance of the evidence, affirmatively, that the land in question is valuable for mineral, regardless of any other qualities it may or may not possess. If defendant fails to show to your satisfaction that the lands are thus valuable, you must find for the
1055 plaintiff.

No. XVI.

It is not a sufficient defense in this case for defendant to show that the lands from which said timber was cut did in fact contain minerals, or even valuable minerals, but it must be shown by a preponderance of the evidence that said lands, at the time of the cutting, were known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them.

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XVII

In the trial of this cause, evidence has been admitted concerning the character of the lands, both within and without the lands from which the timber was cut and removed, where the exterior lands were so closely contiguous to the land from which the timber was cut and the mineral deposits or indications of mineral deposits, if any you find, on such exterior lands where leading and pointing in the direction of the lands in controversy has been allowed
1057 for the purpose of throwing light upon or tending to prove the mineral or non-mineral character of the land in question. The burden of proof is upon the defendant in this case to show the mineral character of the land from which the timber was cut and it must show, not that neigh-

boring or adjacent lands are mineral in character or that the lands in question may hereafter by possibility develop mineral in such quantities as will establish its mineral character, but it must be shown by a preponderance of the evidence that it was valuable for its mineral at the time of the cutting the said timber, and such mineral character must affirmatively be shown by the production of mineral and not from any theory that it may produce it; and you are charged that testimony that adjoining lands contained mineral deposits or indications of mineral deposits is not in itself sufficient proof that said lands from which the timber was cut is in fact mineral, save only that the same is so closely associated with said lands that the veins lodes, ledges of such exterior land may be reasonably believed to enter and run into such lands from which the timber was cut, and such testimony of the character of exterior lands has been admitted only to throw light upon the character of the lands upon which it is alleged that the trespass was committed and not as independent and absolute proof of the character of the lands from which the timber is alleged to have been cut.

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REFUSED INSTRUCTIONS, ASKED FOR BY DEFENDANT.

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The laws of Congress provide that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed are open to exploration and purchase, by citizens of the United States, and those who have declared their intention to become such.

The period of exploration of mineral deposits in the lands in which they are contained is not limited by the United States Statutes, and if the jury finds from the evidence in the case, that the land in Rock Creek Canon, and the adjacent land as to which evidence has been admitted in this case contain precious metal or other valuable mineral deposits in its soil or rock, and that such soil or rock is of character to contain precious metal or other val-

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uable mineral deposits, and that upon exploration of such soil or rock, precious metals in valuable quantities, or
1062 other valuable mineral deposits, may reasonably be expected to be found therein then the jury has a right to find that such land is mineral land.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

You are instructed that lands within a mineral region which are broken, rugged mountain lands with a general formation indicating the existence of mineral, where the precious metals have actually been discovered, and upon
1063 which or in the immediate vicinity of which there are indications of valuable mineral deposits, and which are unfit for cultivation and entry as agricultural lands, are mineral lands within the meaning of the Act of Congress of June 3, 1878, permitting timber to be taken from mineral lands of the United States for building, agricultural, mining or other domestic purposes.

And if you find from the evidence that the lands upon which the timber was cut are of the character just described to you, and that said timber was cut and used for mining or other domestic purposes within this territory, by
1064 bona fide residents of this territory, I charge you that the plaintiff cannot recover and your verdict must be for the defendant.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

You are instructed that any discovery of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper constitutes a discovery of a vein or lode within the meaning of the mining laws of the United States
1065 authorizing the location of lode claims, and that the discovery of such mineral bearing rock in place upon the public lands of the United States renders the land containing the same subject to location and entry as mineral land under the mining laws of the United States.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

1066 You are further instructed that when such a discovery is made, within his claim, the miner may locate his claim, whether the rock or earth therein is rich or poor, whether it assays high or low. The Act of Congress authorizing the location of mining claims imposes no conditions as to the value or extent of the ore. I charge you therefore that if you find from the evidence that within the lands in question in this suit quartz or other rock in place containing either gold, silver, cinnabar, lead, tin or copper, has been discoverd, the lands containing such quartz or other rock 1067 are subject to location as mineral lands regardless of the value or extent of the metals or ores contained therein.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

Placer mines are those in which minerals are found in the softer material which covers the earth's surface.

Deposits of gold-bearing gravel, or deposits of valuable mineral found in particles in the beds of streams are subject to location and entry under the mining laws of the 1068 United States as placer claims, and the lands containing such valuable deposits are mineral lands.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

You are further instructed that the test of the land department as to whether a timber or mineral entry should be allowed, namely, which is the land most valuable for—its timber or its known mines, does not apply in this territory. The benefits of the statute are not limited to the use 1069 of wood or timber growing upon known or located mining claims. Such a construction would wholly defeat the object and purpose of the statute, since such timber or wood belongs to the owner of the mining claim.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

1070 You are instructed that the Act of Congress permitting bna fide residents of this Territory to fell and remove timber for mining and other domestic purposes from the public mineral lands therein, does not provide nor require that mines must be developed and worked on such lands before the timber can be cut. And although you should find from the evidence that no mines have yet been found or worked on the land from which the timber was cut, such fact of itself would not prevent its being mineral land.

1071 And in determining whether or not the land from which the timber was cut is mineral land from which timber could be so cut, the jury is directed to take into consideration any evidence admitted as to the mineral discovered or developed on or adjacent to such land, and the geological formation of such land and the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location
1072 or character.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

The allegations that defendant cut and removed or caused to be cut and removed certain timber from Rock Creek, is one of the material allegations of the complaint in this case, and the jury is instructed that plaintiff cannot recover against said defendant for cutting or removing
1073 said timber unless the plaintiff shows by a preponderance of evidence that defendant, the Copper Queen Consolidated Mining Company actually cut or removed or caused to be cut or removed said timber by its agents or persons employed by it to cut said timber.

REFUSED INSTRUCTION, ASKED FOR BY DEFENDANT.

1074 The jury is instructed that before any Rules or Regulations of the Secretary of the Interior in relation to cutting timber upon the public lands can be considered by it, in this case, evidence of the existence of such rules, and of what such rules are, must have been received in the case.

MINUTE ENTRIES.

Minute book, p. 381.
May 25, 1898.

1075 The suggestion of the death of Daniel D. Ross, one of the above named defendants, having been duly made and it appearing that said defendant has died since the commencement of this action, it is ordered that the above entitled action abate as to the said Daniel D. Ross and that said action proceed against the surviving defendant, The Copper Queen Consolidated Mining Company.

On motion of William Herring, Esq., attorney for the defendants, it is ordered that Sarah I. Herring be and she is hereby entered of record as associate counsel for defendants herein. 1076

On motion of attorneys for defendant herein, it is ordered that the amended answer to the second amended complaint herin be and the same is hereby filed as of this date and subsequent to the order suggesting the death of Daniel D. Ross and abating the suit against said defendant.

This matter coming on for hearing, upon motion of Robert E. Morrison Esq., to strike out certain matters in the amended answer to the second amended complaint herein filed May 24th, 1898, it is ordered, on motion, that the motion to strike out be considered filed as of this date and subsequent to the filing of the amended answer to the second amended complaint and said motion being now ful- 1077

ly argued by respective counsel, and submitted to the Court, the same is by the Court taken under advisement;
1078 it is ordered that the Court stand at recess until 7 P. M. this day.

By and with the consent of the parties to this action, it is ordered by the Court that W. W. Weed be and he is hereby appointed the official stenographer or phonographic reporter before this Court in this case and, first duly sworn, said reporter enters upon the discharge of his duties and it is stipulated and agreed by and between the parties hereto that each party pay one-half of the per diem
1079 of said reporter.

The motion to strike out certain portions of the amended answer to the second amended complaint, having heretofore been fully argued, and submitted and by the Court taken under advisement and the Court being fully advised in the premises; it is ordered that said motion be sustained in part and that the following paragraph seven of said amended answer be stricken out as surplusage, to-wit:
"Defendant further alleges that the Chiricahua Moun-
1080 tains, mentioned in said complaint and in which said timber was cut, as aforesaid, constitute a well known mineral region or district in which many mines and mining claims have been located and worked." Whereupon, plaintiff was granted leave to file herein his third amended complaint and defendant is allowed until tomorrow morning at ten o'clock to file his amended answer to third amended complaint.

1081 This cause coming on regularly this day for trial, Robert E. Morrison, U. S. Attorney for Arizona, Thos. D. Bennett, Asst. U. S. Attorney and Everett E. Ellinwood, special assistant United States Attorney, appearing as counsel for the plaintiff and William Herring and Sarah I.

Herring appearing as counsel for the defendant and the issues of law and the pleadings being now considered, by the Court as finally determined and settled, and both sides 1082
answering ready for trial, thereupon the Clerk is ordered to draw from the box wherein he has deposited the names of the jurors summoned, whereupon come now the following twenty veniremen, who are duly sworn upon their voir dire viz: William Kirlew, George Land, John S. Morrill, J. P. Marsh, Jos. Pascholy, F. M. Allison, F. M. Likes, Rich'd Fleischer, W. N. Cummings, S. P. McCrea, A. Bachelier, J. Knox Corbett, N. H. Chapin, G. H. Doe, H. A. Drachman, Edw'd. Hale, Fred Dubois, J. N. Christenson, George Farrington, A. Robeil; whereupon, Jos. Pascholy was chal- 1083
lenged by the plaintiff for cause, and the challenge being allowed, the Clerk draws the name of John Keating who was duly sworn on his voir dire and F. M. Allison was challenged by the plaintiff for cause, the Clerk draws from the box the name of W. W. Dickenson, who was duly sworn on his voir dire, and this being the hour of adjournment for the day, the Court admonishes the jury relative to their conduct during the recess, orders that Court adjourn until tomorrow morning at ten o'clock.

It is ordered that the District Court of the First Ju- 1084
dicial District do now stand at recess until 10 A. M. May 26th, 1898.

This cause coming on now this day, the counsel for the respective parties being present, wherupon the further proceedings of the Court are as follows:

The Clerk calls the names of the veniremen who wer in the jury box at the adjournment of Court on yesterday 1085
and all answer thereto, viz: William Kirlew, George Land, Jno. P. Morrill, J. P. Marsh, F. M. Likes, Rich'd. Fleischer, W. N. Cummings, S. P. McCrea, A. Batchelier, J. Knox Corbett, N. H. Chapin, G. H. Doe, H. A. Drach-

man, Edw'd. Hale, Fred Dubois, J. N. Christenson, Geo. Farrington, A. Robeil, John Keating, W. W. Dickenson;
1086 whereupon the plaintiff challenges W. N. Cummings for cause, which challenge is allowed by the Court, to which defendants except and the Clerk draws from the box the name of F. N. Wolcott, who was duly sworn upon his voir dire; whereupon W. H. Chapin was challenged by the plaintiff for cause, which was sustained by the Court and the Clerk drew from the box the name of R. McCormick, who was duly sworn upon his voir dire; wherupon the plaintiff challenges G. H. Doe for cause which challenge was allowed and the Clerk drew the name of Frank Ker-
1087 nan, who was duly sworn on his voir dire, whereupon the plaintiff challenges J. N. Christensen for cause which challenge is allowed by the Court and the Clerk draws the of C. L. Ainsworth, who was duly sworn upon his voir dire; whereupon the plaintiff challenges A. Robeil for cause which challenge was allowed and the Clerk drew the name of C. L. Ainsworth, who was duly sworn upon his voir dire whereupon the plaintiff challenged W. W. Dickensen for cause, and the challenge being allowed by the Court, the Clerk draws the name of Jos. Muheim who was duly sworn
1088 upon his voir dire; whereupon the plaintiff challenged W. F. Kitt for cause and said challenge being allowed, the defendants except thereto, and the Clerk drew from the box the name of S. Y. Barkley, who was duly sworn upon his voir dire whereupon the plaintiff challenges Jos. Muheim, for cause, and said challenge being allowed by the Court, the Clerk draws from the box the name of P. A. Loffgreen who was duly sworn upon his voir dire; by consent of both parties hereto, it is ordered that George Land, a venireman passed for cause, be and he is hereby excused from the pan-
1089 el by reason of his illness, whereupon the Clerk draws from the box the name of F. W. Sweetland, who was duly sworn upon his voir dire.

Recess until 2 P. M.

Upon the reassembling of Court, comes now Robert E. Morrison, United States Attorney, T. D. Bennett, Assistant United States Attorney and E. E. Ellinwood, Special 1090
Assistant United States Attorney as counsel for plaintiff, and William Herring and Sarah I. Herring, as counsel for defendants and now all parties being content with the jury for cause, the right of peremptory challenges is exercised by the respective parties according to law, whereupon come now the following twelve jurors, good and lawful, men to-wit: Jno. S. Merrill, F. M. Likes, A. Bachelier, J. Knox Corbett, Edw'd. Hale, George Farrington, John Keating F. N. Wolcott, R. McCormick, Frank Kernan, P. A. Loffgreen, and F.W. Sweetland, who are duly impanelled and 1091
sworn to try the issues joined between the plaintiff and the defendant herein, and the complaint and answer herein having been read to the jury and this being the usual hour of adjournment for the day, the Court admonishes the jury as to their conduct during the recess and orders that the further hearing of the case be continued until to-morrow morning at 9:30 o'clock.

May 26, 1898.

Court met, all parties present, jury called, all answering present. 1092

Court adjourns until May 27th, 1898.

(May 27th, 1898.) Upon the reassembling of Court, Robert E. Morrison, United States Attorney, T. D. Bennett, Assistant United States Attorney, E. E. Ellinwood, Special Assistant United States Attorney, counsel for plaintiff and William Herring and Sarah I. Herring, counsel for defendant being present, the names of the jurors 1093
are called by the Clerk and all answer their names, to-wit: Jno S. Merrill, F. M. Likes, A. Bachelier, J. Knox Corbett, Edw'd. Hale, Geo. Farrington, John Keating, F. N. Wolcott, R. McCormick, Frank Kernen, P. A. Loffgreen and

F. W. Sweetland, whereupon the further trial of the cause proceeds, as follows, to-wit: The plaintiff, to maintain the
1094 issues upon its part, called as witnesses, who are duly sworn and examined and cross examined, the following named persons: Edgar J. Trippel, Thos. J. Gerdine, E. E. Ellinwood and Ben. Williams; whereupon the prosecution rests; the Court admonishes the Jury and continues further consideration until 2 P. M. this afternoon.

Upon the reassembling of Court and counsel for both parties being present, the names of the jury are called and all answer thereto; whereupon the further proceedings of this case were had as follows: The defendant to maintain,
1095 upon its part, the issues, introduces and offers in evidence certain documentary evidence, marked Defendant's exhibits A B and C; the defendant also called as witnesses George J. Roskruge, who was duly sworn, examined and cross examined, and the Court, having admonished the jury as to their conduct during recess, orders that the further consideration of this case be continued until 10 o'clock to-morrow morning.

1096

(May 28th, 1898.) Upon the reassembling of Court, the United States Attorney, Robert E. Morrison, Thos. D. Bennett, Assistant United States Attorney, E. E. Ellinwood, Special Assistant United States Attorney, counsel for plaintiff, and William Herring, and Sarah Herring, counsel for defendant being present, the names of the jurors are called by the Clerk and all answer thereto to-wit: Jno. S. Merrill, F. M. Likes, A. Bachelier, J. Knox Corbett, Edward Hale,
1097 George Farrington, John Keating, F. N. Wolcott, R. McCormick, Frank Kernan, P. A. Loffgreen and W. A. Sweetland and the examination of George J. Roskruge on his voir dire as to the admissability of a certain map, as evidence by defendants, not being completed, the jury is now ex-

cused during the continuance of such examination and argument and being admonished by the Court relative to their conduct during the intermission. 1098

Recess until 2 P. M.

Upon the reassembling of Court, and counsel for both parties being present, the examination continues and A Wentworth, Jos. Smith and M. J. Brown were duly sworn and examined,, and the Court being fully advised upon certain documentary evidence introduced by the defendant, sustains the objection to the introduction of the defendant's map and rejects it as evidence, whereupon on motion by counsel for defendant, it is ordered that the further consideration of this case be postponed until 9 o'clock, 1099 Tuesday morning, May 31st, 1898.

(May 31st, 1898.) Court convenes, all parties present. Jurors called and all answer to call; witnesses sworn and examined this day George J. Roskruge, William P. Blake, and Thomas R. Sorrin; Court admonishes jurors and adjournment taken until June 1st, 1898.

1100

(June 1st, 1898) Court convenes, all parties present; jury called and all answer to their names; examination of witnesses proceeds; witnesses sworn and examined this day: William Herring, Edward J. Hand, Charles Goetgens, Christopher Gauer. Adjournment until June 2nd, 1898.

(June 2nd, 1898.) All counsel and jurymen present: 1101

witnesses sworn and examined by defendant this day: F. M. Abrams, P. A. Boyer, August Joerss, E. G. Boyer, Victor Artl, E. E. Burlingame, Edward J. Hand, Frank Wil-

liams, August Barron; Court adjourned until June 3rd, 1898.

1102

(June 3rd, 1898.) All counsel and jurymen present; witnesses examined by defendant this day: Louis D. Ricketts, Morgan Hedspeth, W. L. Hurd, J. H. Tevis, George W. Cheney, Frank Williams and Joseph Smith; adjournment taken until June 4th, 1898.

1103 (June 4th, 1898.) All counsel and jurymen present: witnesses examined by defendant, this day: Joseph Smith, Ben. Williams, and Geo. Christ; defendant rests. Witnesses examined by plaintiff, R. H. Connor, R. N. Leatherwood, Charles Hood, D. A. Bowman, H. O. Flipper; testimony of latter two read, taken on former trial and testimony of S. A. Hawk, Theo. Comstock and Mead Goodloe is read to jury in compliance with stipulation. Douglass Snyder, E. L. Wetmore and Charles Smith also sworn and examined: adjournment taken until June 6th, 1898.

1104

(June 6th, 1898.) All counsel and jurymen present; Court met; witnesses examined by plaintiff, Thos. G. Gerdine, and Waldemar Lindgren; introduces map in evidence.

Recess until 2 P. M.

Upon the reassembling of the Court, Robert E. Morrison, United States Attorney, T. D. Bennett, Assistant United States Attorney, E. E. Ellinwood, Special Assist-
1105 ant United States Attorney, counsel for the plaintiff, and William Herring, and Sarah I. Herring, counsel for the defendant, being present, the Clerk calls the names of the jury and all answering thereto, the trial of this case proceeds as follows: The evidence in said case being now fully closed

on the part of both plaintiff and defendant and counsel for plaintiff stating that they desired to submit a motion in the absence of the jury, the jury being first duly admon- 1106
ished as to their conduct during the intermission, were thereupon excused to reappear at nine o'clock to-morrow morning whereupon counsel for the plaintiff moved the Court to instruct the jury to find for the plaintiff, that the defendant has failed to establish any authority or license to cut timber under the Act of Congress in that behalf and said motion being argued by counsel and submitted to the Court, is by the Court denied, to which ruling of the Court, in denying said motion, counsel for the plaintiff did then and there instantly except; Court adjourned until June 1107
7th, 1898.

(June 7th, 1898.) Court met, counsel and jurymen all present; argument by respective counsel opened. Court adjourned until June 8th, 1898.

(June 8th, 1898.) Court met; all parties present; jur- 1108
ors all answered to their names. Argument for defendant closed by William Herring and closed for plaintiff by Robt. E. Morrison, Esq., U. S. Attorney; instructions given to the jury by the Court and jury retired to consider of its verdict and subsequently the jury returned into Court in charge of the officer of the Court, who had been sworn to attend them, their names are called by the Clerk and all answer thereto and upon being asked by the Court if they have agreed upon a verdict, through their foreman reply that 1109
they have and thereupon, through their foreman, present the verdict following to-wit: United States of America, Plaintiff, vs. Copper Queen Consolidated Mining Company, a

corporation, defendant: "We, the jury" duly impanelled and sworn, in the above entitled cause, upon our oaths do
1110 find upon the issues joined for the defendant." J. Knox Corbett, foreman; and said jury upon being interrogated by the Court, say that this is their verdict, and so say they all. Wherupon counsel for the plaintiff request that the jury be polled which is done and each juror, separately : swering, that such is his verdict, the Court orders the verdict recorded and said jury discharged; Court adjourns until June 9th, 1898.

1111

(June 9th, 1898.) On motion and by consent of parties it is ordered that the hearing on motion to set aside verdict and judgment and grant a new trial herein be set for June 29th, 1898.

The verdict of the jury in said cause having been heretofore returned and recorded, it is now by the Court ordered adjudged and decreed that said defendant Copper
1112 Queen Consolidated Mining Company, a corporation, do have and recover from and against said plaintiff the United States of America, judgment upon the issues joined in this action: Court thereupon adjourned from day to day until the 29th day of June, 1898.

(June 29th, 1898.) Parties in Court by their respect-
1113 ive counsel, whereupon the motion to set aside verdict and judgment and grant a new trial herein, came on for and was argued by respective counsel herein and said argument continues on the thirtieth day of June, 1898 and Court adjourns until July 1st, 1898.

(July 1st, 1898.) Upon the 29th day of June, 1898, the same being one of the days of the regular March, 1898, ter: of said Court, comes on for hearing the motion to 1114
set aside the verdict and judgment and for a new trial, filed herein by plaintiff on the ninth day of June, 1898, and the motion having been fully argued by counsel for the respective parties hereto and the Court being fully advised in the premises, on the first day of July, 1898, overrules and denies said motion for a new trial and thereupon counsel for the plaintiff, in open Court, instantly except to said ruling.

And thereupon and thereafter on said first day of 1115
July, 1898, the said plaintiff, in open Court, gives notice of appeal to the Supreme Court of the Territory of Arizona, from the verdict and judgment found and entered h- in and also from the order of the Court denying the motion for a new trial herein.

And on motion of plaintiff the Court orders that the plaintiff have thirty days from and after the close of the present March term of this Court within which to prepare and file a statement of facts herein and it is further ordered that the said plaintiff do have twenty days from and 1116
after the close of said March term of this Court, within which to prepare and file a bill of exceptions in this case.

(October 14, 1898.) On motion of Robt. E. Morrison, United States Attorney, it is hereby ordered that the statement of facts and bill of exceptions to be hereafter filed in this cause, shall, when so filed, be registered and filed by the Clerk of this Court as of date of September 10th, 1117
1898, agreeable to the stipulation of the respe- parties hereto filed this day.

Court then adjourned for the March Term, 1898.

United States of America,
Territory of Arizona,
1118 First Judicial District. } ss.

I, William Herring, attorney of record for the defendant herein, do hereby certify that the foregoing Bill of Exceptions and Statement of Facts was submitted to me on the fifteenth day of February, 1899.

WILLIAM HERRING,
Attorney for Defendant.

United States of America,
Territory of Arizona,
1119 First Judicial District. } ss.

We, Robert E. Morrison, United States Attorney for the Territory of Arizona, and Attorney of record for the plaintiff herein and William Herring, attorney of record for the defendant, do hereby agree that the above and foregoing is a full, true and correct Bill of Exceptions and Statement of Facts in the above entitled action.

Dated this 10th day of September 1898.

ROBT. E. MORRISON,
1120 Attorney for Plaintiff.

United States of America,
Territory of Arizona,
First Judicial District. } ss.

I, George R. Davis, an Associate Justice of the Supreme Court of Arizona, and presiding Judge of the District Court of the First Judicial District of the Territory of Arizona as aforesaid, do hereby certify that this Bill of
1121 Exceptions and Statement of Facts in the case of the United States of America, plaintiff, vs. the Copper Queen Consolidated Mining Company, defendant, has been submitted to me and I find the same correct and do hereby approve, settle, allow and sign the same and make the same a part

of the record in this case and the same is accordingly done in term time at said March, 1898, term of said Court; this 10th day of September, 1898. 1122

GEO. R. DAVIS,
Judge.

United States of America,
Territory of Arizona,
First Judicial District. } ss.

I, Clinton D. Hoover, Clerk of the said District Court, of the First Judicial District of the Territory of Arizona, do hereby certify that the foregoing Bill of Exceptions and Statement of Facts was filed in my office as per stipulation, 1123 on the 10th day of September, 1898.

CLINTON D. HOOVER,
Clerk.

In the District Court of the First Judicial District of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States. 1124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY,
Defendant.

ASSIGNMENTS OF ERROR. 1125

Comes now the plaintiff, United States of America, and assigns as error in the foregoing record and proceedings the following, to-wit:

ASSIGNMENT 1: The Court erred in denying plaintiff's motion, made at the close of the evidence in said
1126 cause, that the Court instruct the jury to find on the evidence adduced a verdict for the Government, for the reasons:

a. That the defendant had failed to establish any authority or license to cut timber under the Act of Congress in that behalf.

b. That the burden was upon the defense to show the mineral character of the land and defendant had utterly failed to establish its mineral character.

1127

c. The cutting, taking and removing of the timber having been admitted, the plaintiff was entitled to a verdict on the evidence adduced.

ASSIGNMENT 2. The Court erred in refusing to give that portion of plaintiff's first instruction which set forth, in toto, the rules and regulations of the Secretary of the Interior, relating to the cutting of timber on public lands, under the Act of Congress of June 3rd, 1878, for the reason:

1128

That the Courts take judicial notice of such rules and regulations and the same are a part of the law of this case.

ASSIGNMENT 3. The Court erred in refusing to give plaintiff's second instruction for the reason:

That it was necessary for the defendant to make a successful defense to show, by a preponderance of the evidence, that the value of the mineral per ton, if any there was, in some degree exceeded the usual and economical cost of mining such mineral per ton and this proposition
1129 is not included in the charge given by the Court to the jury.

ASSIGNMENT 4. The Court erred in refusing plaintiff's instruction 4½, for the reasons:

a. That the law is that the defendant herein was required to prove by a preponderance of the evidence, that the land from which the timber was cut was more valuable for the mineral therein than for any other purpose. 1130

b. That such lands are not suitable for agricultural purposes, grazing or cultivation or valuable solely for the timber thereon.

And this instruction was not included in the charge of the Court.

ASSIGNMENT 5. The Court erred in refusing plaintiff's instruction No. IX, for the reason: 1131

The law is that the location of mining claims immediately contiguous to or closely associated with the lands from which the timber was cut, in itself, is not proof of the mineral character of the land from which the timber was cut.

ASSIGNMENT 6. The Court erred in refusing plaintiff's instruction No. XI, for the reason:

That unless the person who cuts the timber knew positively, at the time of the cutting, that the land was mineral in character, he and those to whom he sells, are equally liable for the full value of the timber at the place of delivery. 1132

And this instruction was not included in the charge of the Court.

ASSIGNMENT 7. The Court erred in refusing to give plaintiff's instruction No. XII, for the reason:

That a person who cuts timber on public land, must know, at the time of the cutting, that the land where he cuts was of a strictly mineral character and traces and indications will not do. 1133

And this instruction was not included in the charge of the Court.

ASSIGNMENT 8. The Court erred in refusing plaintiff's instruction No. XIII, for the reason:

1134 That it is wholly immaterial whether the lands were of any value for agricultural, grazing or other purposes but such lands must be valuable for mineral, regardless of any other qualities.

ASSIGNMENT 9. The Court erred in refusing plaintiff's instruction No. XVI, for the reason:

That the lands at the time of the cutting, must be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting such
1135 mineral.

ASSIGNMENT 10. The Court erred in refusing plaintiff's instruction No. XVII, for the reason that while evidence is admissable to show the character of lands as to mineral which are immediately contiguous to the land from which the timber ws cut, it is solely to throw light if possible upon the question of the mineral or non-mineral character of the land in question, but such adjoining lands must have been valuable for mineral at the time of the cutting and shown to be by the production of mineral
1136 and not from any theory.

That even if immediately contiguous lands have mineral deposits, that in itself, is not proof that the land in question was mineral in character nor is it independent and absolute proof of the mineral character of the lands from which the timber was cut.

ASSIGNMENT 11. That the judgment of the Court is contrary to the facts in this:

a. That the defendant had wholly failed on the trial
1137 to establish any authority of license to cut timber under the Act of Congress of June 3rd, 1878.

b. That there was no evidence of the citizenship of Ross, who cut the timber.

C. That the defendant did not prove by a preponderance of the evidence that the land from which the timber was cut, as defined in the Court's instructions, and as required by the law to be, the evidence for the Government being overwhelmingly that the land was non-mineral. 1138

d. That the judgment was contrary to the instructions of the Court, as given to the jury, in every respect and upon every proposition of law therein contained.

ASSIGNMENT 12. The Court erred in refusing to grant the motion to set aside the verdict and judgment of the Court, and grant a new trial herein and plaintiff assigns as the reasons therefor, all the reasons in said motion set forth and also each and every of the assignments of error hereinbefore made, with a like effect as if the same were written at length herein. 1139

Attorney for Plaintiff.

1140

Endorsed: "United States of America vs. Copper Queen Consolidated Mining Company. Assignments of Error; filed this 15th day of February, 1899.

CLINTON D. HOOVER,
Clerk.

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1142

1143 United States of America,
Territory of Arizona,
First Judicial District. } ss.

I, Clinton D. Hoover, Clerk of the District Court of the First Judicial District of the Territory of Arizona, do hereby certify that the foregoing transcript was demanded by Robert E. Morrison, attorney of record for the above named plaintiff on the 26th day of May, A. D., 1899, and that on the 9th day of June A. D., 1899, I delivered the same to the Post-master at Tucson, Arizona, it being addressed to "Robert E. Morrison, Esq., U. S. Attorney, Pres-
1144 cott, Arizona."

CLINTON D. HOOVER,
Clerk District Court, First Judicial
District, Territory of Arizona.

1145

C. That the defendant did not prove by a preponderance of the evidence that the land from which the timber was cut, as defined in the Court's instructions, and as required by the law to be, the evidence for the Government being overwhelmingly that the land was non-mineral. 1138

d. That the judgment was contrary to the instructions of the Court, as given to the jury, in every respect and upon every proposition of law therein contained.

ASSIGNMENT 12. The Court erred in refusing to grant the motion to set aside the verdict and judgment of the Court, and grant a new trial herein and plaintiff assigns as the reasons therefor, all the reasons in said motion set forth and also each and every of the assignments of error hereinbefore made, with a like effect as if the same were written at length herein. 1139

Attorney for Plaintiff.

1140

Endorsed: "United States of America vs. Copper Queen Consolidated Mining Company. Assignments of Error; filed this 15th day of February, 1899.

CLINTON D. HOOVER,
Clerk.

1141

1142

United States of America,
1143 Territory of Arizona, } ss.
First Judicial District.

I, Clinton D. Hoover, Clerk of the District Court of the First Judicial District of the Territory of Arizona, do hereby certify that the foregoing transcript was demanded by Robert E. Morrison, attorney of record for the above named plaintiff on the 26th day of May, A. D., 1899, and that on the 9th day of June A. D., 1899, I delivered the same to the Post-master at Tucson, Arizona, it being addressed to "Robert E. Morrison, Esq., U. S. Attorney, Pres-
1144 cott, Arizona."

CLINTON D. HOOVER,
Clerk District Court, First Judicial
District, Territory of Arizona.

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United States of America,
Territory of Arizona,
First Judicial District. } ss.

I, Clinton D. Hoover, Clerk of the said District Court 1147
of the First Judicial District of the Territory of Arizona, do hereby certify the above and foregoing to be a true, full and complete exemplification and transcript of the records and proceedings and of the whole thereof in a certain action pending in said Court wherein the United States of America is plaintiff and the Copper Queen Consolidated Mining Compny, is defendant and numbered B 41 including and index to said transcript found at pages 1 and 2 thereof.

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Clerk District Court F Judicial
District, T Arizona.

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294 In the supreme court of the Territory of Arizona.

(Order of the court made January 16th, A. D. 1899.)

On motion of Thos. D. Bennett, asst. U. S. attorney, leave was granted to file stipulation in the cause of United States of America vs. Copper Queen Consolidated Mining Company, a corporation, and to have leave to file the record in this cause at any time during the term.

In the district court of the first judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. And in the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, defendant. } No. B-41.

295 Whereas the estimate of W. W. Weed, official court stenographer of the first judicial district of the Territory of Arizona, has placed the time in which the transcript of the record in the above entitled cause can be reduced to writing and filed in said court, at at least ninety days from the date hereof; and

Whereas said record is voluminous and it has been conceded by respective counsel that the bill of exceptions and statement of facts can not be compiled by counsel for plaintiff and appellant within the short time intervening between the completion of the transcript and the opening of the supreme court of the Territory of Arizona at the January term thereof, 1899:

Now therefore, it is hereby stipulated and agreed by and between the respective attorneys of record that the time for appeal to be hereafter perfected in this cause is extended, and it is understood and agreed that said cause will not be heard in the supreme court of the Territory
296 of Arizona, and will not be presented there for determination until the January term of said supreme court in the year 1900.

That plaintiff and appellant have until the 15th day of February, 1899, to file its statement of facts and bill of exceptions in the said first judicial district court:

Provided, that in case, by reason of unavoidable accidents or delay, the transcript of the record in this cause shall not be completed by the official stenographer before the first of January, 1899, counsel for the defendant and appellee will not insist that said bill of exceptions and statement of facts shall be presented to the court for approval by the said 15th day of February, 1899; and if it shall appear that, notwithstanding reasonable diligence on the part of counsel for plaintiff and appellant, it will then have been impossible to complete said statement of facts and bill of exceptions, a further extension of time for such purpose shall then be made as may be agreed upon.

297 The plaintiff and appellant shall have until the 15th day of April, 1899, within which to file its brief in the supreme court of the Territory of Arizona. That thereafter defendant and appellee shall have until the first day of September, 1899, to file its brief in the supreme court of the Territory of Arizona. That thereafter plaintiff and appellant shall have until the first day of November, 1899, to file its reply brief to defendant and appellant's brief.

Both of the respective parties hereto waive the statutory requirements as to the time for the perfection of appeal, filing statements of facts and bill of exceptions and briefs, and hereby request that this stipulation be entered in the supreme court of the Territory of Arizona as a part of the record on appeal herein, and the said statement of facts and bill of exceptions when filed in the lower court agreeable to this stipulation, shall be filed as of the 10th day of September, A. D. 1898, and
298 so filed and registered by the clerk of said court.

In witness whereof William Herring, esq., for appellee, and the United States of America, by Robert E. Morrison, esq., and Thomas D. Bennett, esq., its attorneys, have made and entered into this stipulation and agreement, and have caused the same to be filed as a part of the record in this above-entitled cause this 14th day of October, A. D. 1898.

WILLIAM HERRING,
Attorney for Appellee.

ROBT. E. MORRISON,
THOS. D. BENNETT,
Attorneys for Appellant.

UNITED STATES OF AMERICA, [1. R. STAMPS 10 c.]
First Judicial District, Territory of Arizona, ss:

I, Clinton D. Hoover, clerk of the district court of the first judicial district of the Territory of Arizona, do hereby certify that I have compared the foregoing and annexed copy of a stipulation in the case of the United States of America, plaintiff, vs. The Copper Queen Consolidated Mining Company, a corporation, defendant, with the original records of the same remaining in this office, and the same is a correct transcript therefrom, and of the whole of said original record, and that the same was filed in this office on October 14th, 1898.

Witness my hand and the seal of said court affixed this 13th day of January, A. D. 1899.

[COURT SEAL.] CLINTON D. HOOVER, *Clerk.*

299 (Endorsed:) No. 690. In the supreme court of the Territory of Arizona. United States of America, appellant, vs. Copper Queen Mining Co., appellee. Certified copy of stipulation. Filed Jan. 16th, 1899. Lloyd Johnson, clerk.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
COPPER QUEEN CONSOLIDATED MINING Company, a corporation, appellee. } Motion to dismiss appeal.

Comes now the appellee in the above cause and moves this honorable court *of* dismiss the appeal herein upon the following grounds of motion:

I.

That appellant has failed to file any abstract of record, or copy thereof, in said cause in the supreme court, in accordance with the provisions of act No. 71, laws of 1897, entitled "An act relating to appeals and writs of error from the district and circuit courts of the Territory of Arizona to the supreme court."

II.

That appellant has failed to serve on appellee any copy of the abstract of record in said cause, as required by sec. 3 of the above-mentioned act.

Wherefore appellee prays that the appeal of appellant herein be dismissed.

Dated January 9th, 1900.

WILLIAM HERRING,
Attorney for Appellee.

300 Filed Jan'y 9th, 1900. Thomas Grindell, clerk.

UNITED STATES OF AMERICA, APPELLANT, *vs.* COPPER QUEEN CONSOLIDATED MINING Company, a corporation, appellee.	Minute entry. January 9th, 1900.

It is ordered that the motion to dismiss, filed herein by appellee, be submitted.

It is further ordered that appellant herein have 2 days to answer brief.

On Wednesday, January 10th, 1900, that being a regular judicial day of the January term, 1900, of said supreme court, the following record in this case for this day was made, to wit:

Title of cause.

On motion of Mr. R. E. Morrison, attorney for appellant, it is ordered that he have until January 15th in which to file reply brief herein.

On Tuesday, January 16th, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case for this day was made, to wit:

Title of cause.

The motion of appellee to dismiss, filed herein, having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that said motion be, and the same is hereby, denied.

On motion of Mr. William Herring, attorney for appellee, it is
301 ordered that he have 2 days to insert references to transcript in his abstract, and cause set for hearing January 22nd.

On motion of Mr. R. E. Morrison, attorney for appellant, it is ordered that he have permission to add additional authorities to his brief.

It is further ordered that appellee have permission to add additional authorities to his brief.

U. S. SENATE,
OFFICE OF THE SECRETARY,
Washington.

I, William R. Cox, Secretary of the Senate of the United States, do hereby certify that the hereto-annexed printed copy of Senate report Number One hundred and twenty-two of the second session of the Forty-fifth Congress from the Committee on Public Lands, to accompany Senate bill Number Twenty, authorizing the citizens of Colorado, California, and Nevada, and the Territories, to fell and remove timber on the public domain for mining and domestic purposes, etc., is a true and correct printed copy of the original on file in this office.

Given under my hand and the seal of the Senate of the United States this sixth day of January, A. D. nineteen hundred.

[SEAL.] (Signed) WM. R. COX.
Secretary U. S. S.

In the Senate of the United States.

MARCH 6, 1878.—Ordered to be printed.

Mr. Chaffee, from the Committee on Public Lands, submitted the following report (to accompany bill S. 20):

302 The Committee on Public Lands, to whom was referred the bill (S. 20) authorizing the citizens of Colorado, California, and Nevada, and the Territories, to fell and remove timber on the public domain for mining and domestic purposes, have had the same under consideration, and submit the following report, accompanied with a substitute for said bill, and recommend its passage:

The committee have carefully considered the subject of timber and timber lands, and, after mature deliberation, with the view of devising the best methods of preserving, cultivating, and disposing of the same, have come to the conclusion that a distinction should be made between such trees as grow upon the mountains in the mineral districts and the forests of pine, oak, and other timber that grow in the more level portions of the country.

While the lumber of the latter is a regular and important article of commerce, and is constantly being cut and transported in large quantities to ready markets, the character of the former renders the timber unfit for commercial purposes. Even were this otherwise, it is usually found in such inaccessible places as to preclude its transportation to market. Consequently it is used by the prospector, the miner, and other members of mining communities for domestic and other practical purposes incidental to the development of mineral districts. The committee do not believe that it would be wise policy on the part of the Government to seek to profit directly by the sale of this kind of timber nor to tax the pioneer by compelling him to purchase it. Except as a source of revenue, by sale to the settler, it never can be of any value to the Government. Should the experiment be tried of requiring payment for it, it would be found that the cost of keeping agents for its sale and officers to prevent or punish infractions of the law at remote and widely separated

settlements would largely consume all sums received for this
303 timber by the Government. Thus, while it is practically of but little value to the Government, it is essential to the settler and indispensable to his occupation and development of the mineral lands. It has been the custom of Congress to encourage the exploration and development of the mineral regions of the United States; and in this connection it should be borne in mind that it is mainly to the indomitable energy, hardihood, and daring of the pioneer that we are indebted for the discovery and development of the rich gold and silver districts of the country. What would be the condition of this country to-day had it not been for our product of gold and silver during the last quarter of a century? The $100,000,000 annually added by the United States to the world's stock of bullion will amply pay for the use of the scattering timber found in those localities. Instead of imposing this timber as a tax upon this important branch of industry, the committee are of opinion that, under the restrictions provided in this bill and on grounds of equity and public policy, the Government should allow its free use by the actual settler for the purposes alluded to herein.

In 1866 Congress, by express statute, authorized the occupation and use of these mineral lands, as follows:

Be it enacted, &c., That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs and rules of miners in the several mining districts, so far as the same may not conflict with the laws of the United States.

This is an express grant by the Government to the people who occupy
this portion of the public domain. There was no law by which
304 settlers could purchase either the timber necessary for such occupation or the land upon which that timber is found. It is a well-settled principle applied to grants that the grant carries with it all the incidents necessary to enable the grantee to make the grant available. It is absolutely necessary for settlers to have timber for domestic use in order to enable them to occupy these mineral lands. It would have been a mockery to make this grant without including such use of timber. It cannot be said that it was ever intended the occupants should pay for this timber, since no provision has ever been made for its sale or purchase. The Government is more than paid for its value by the increased wealth added by mining operations to the grand total of taxable property. In view of these considerations, the committee recommend the passage of the substitute, which contains limitations and guards for the protection of undergrowth and such other restrictions as seem just and equitable.

UNITED STATES OF AMERICA, *City of Washington*, ss.

I, Alexander McDowell, Clerk of the House of Representatives, certify the following to be a correct extract from the Journal of the House of Representatives of the United States, of May 9th, 1878, second session, Forty-fifth Congress:

"Mr. Thomas M. Patterson from the Committee on the Public Lands, to which was referred the bill of the Senate (S. 20) authorizing the citizens

of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes, reported the same without amendment.

"The House having proceeded to their consideration, Mr. Fort submitted amendments; which were severally agreed to.

"The bill as amended was then read the third time and passed.

305 "Mr. Patterson moved to reconsider the vote last taken, and also moved that the motion to reconsider be laid on the table; which latter motion was agreed to.

"Ordered, That the Clerk request the concurrence of the Senate in the said amendments."

In testimony whereof I have hereunto set my hand and affixed the seal of the House of Representatives of the United States this sixth day of January, A. D. 1900.

[SEAL.] (Signed) A. McDOWELL,
Clerk of the House of Representatives.

Filed Jan'y 20th, 1900. Thomas Grindell, clerk.

UNITED STATES OF AMERICA, APPELLANT,
vs.
THE COPPER QUEEN CONSOLIDATED MINING Company, a corporation, Appellee.
} Minute entry, January 22nd, 1900.

Mr. William Herring, attorney for appellee herein, moves that Mrs. Sarah I. Sorin be entered as associate counsel for appellee, and that the name of Sarah Inslee Herring be changed on the roll of attorneys to Mrs. Sarah I. H. Sorin; which motion was granted by the court.

Mr. Robt. E. Morrison, attorney for appellant herein, states that attorney for appellee ordered all the papers in this cause sent to this court from the district court of Pima County, and moves that the clerk of this court be instructed to send all the original papers back to the district court, and that this be done at the expense of appellee herein; whereupon the court ordered said motion submitted.

This cause coming on regularly for hearing was argued by Mr.
306 R. E. Morrison for appellant, and argument continued until to-morrow.

On Tuesday, January 23rd, 1900, that being a regular judicial day of the January term, 1900, of said court, the following record in this case for this day was made, to wit:

Title of cause.

Mr. William Herring asks for more than one and one-half hours in which to argue this cause, which was not granted.

On motion of Mr. Herring, he was granted permission to have certain papers herein printed and allowed to withdraw the same for that purpose.

This cause being continued from yesterday's session, was argued by Mrs. Sarah Sorin and Mr. William Herring for appellee and Mr. Thos. D. Bennett for appellant, and ordered submitted.

No. 690.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee.

Copies of Exhibits A, B, and C, referred to in transcript of record, on appeal, fols. 65, 66, and 67, and ordered by the supreme court of the Territory of Arizona to be printed and made a part of said transcript of record and filed in said cause in said supreme court.

WILLIAM HERRING,
Attorney for Appellee.

307

No. 690.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee.

EXHIBIT A.

Certified copy of the certificate of incorporation of the Copper Queen Consolidated Mining Company, filed in the office of the secretary of the Territory of Arizona on the 21st day of November, A. D. 1890, admitted in evidence upon the trial of the action in the court below (fol. 65, transcript of record, on appeal) and ordered by the supreme court of the Territory of Arizona to be printed and made a part of the said transcript of record and filed in said cause in the said supreme court.

United States of America, State of New York. By Joseph B. Carr, secretary of state and custodian of the great seal thereof.

I, Joseph B. Carr, secretary of state of the State of New York, do hereby certify that I am secretary of the State of New York; that the certificate and attestation attached to the annexed instrument is my certificate, and made by me on the day and date thereof, and that I am the proper officer to make such certificate and attestation, and that the seal attached
308 thereto is the seal of office of the secretary of state of the State of New York, and that I am the proper custodian and keeper of the great seal of said State, and that the said certificate and attestation is in due form.

[SEAL.] In testimony whereof the great seal of the State is hereunto affixed.

Witness my hand at the city of Albany, the 25th day of November, in the year of our Lord one thousand eight hundred and eighty-five.

JOSEPH B. CARR,
Secretary of State.

Certificate of incorporation or articles of association of the Copper Queen Consolidated Mining Company.

STATE OF NEW YORK,
City and County of New York, ss:

Be it known that we, the undersigned, Horace K. Thurber, William H. Martin, William E. Dodge, jr., D. Willis James, and Edward Smith, all of the city, county, and State of New York, and Charles C. Martin, and Clarence F. Birdseye, of the city of Brooklyn, county of Kings, and State of New York, who desire to form a corporation pursuant to and in conformity with chapter 40 of the Laws of New York for 1848, being the act of the legislature of the State of New York, passed on the 17th day of February, one thousand eight hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," and the several acts of the said legislature amending, modifying, or extending the same, or supplementary thereto, do by these presents associate ourselves together and form a body politic and corporate under the name and style of the Copper Queen Consolidated Mining Company,
309 and the following are hereby declared to be—

1st. The corporate name of said company.

2nd. The object for which the company is formed.

3rd. The amount of the capital stock of the said company.

4th. The number of shares of which the said stock shall consist.

5th. The term of existence of the said company.

6th. The number of trustees and their names who shall manage the concerns of said company for the first year.

7th. The name of the town and county in which the operations of the said company are to be carried on.

First. The corporate name of the said company is hereby declared to be the Copper Queen Consolidated Mining Company.

Second. The objects for which the said company is formed are the obtaining, quarrying, producing, mining, roasting, smelting, treating, and reducing of copper, iron, silver, gold, or other ores and substances, and the manufacturing, procuring, and producing therefrom and disposing of copper, iron, silver, gold, or other metals or substances, and the acquiring, purchasing and holding, managing, operating, carrying on, and rendering productive all such lands, premises, mining claims, quarries, mineral deposits, lodes, leads, or formations, ores, fluxes, or other material, manufactured or unmanufactured, stock, buildings, roads, tracks, tramways, furnaces, smelters, and other machinery, fixtures, property, and effects as may be necessary, proper, or convenient for the said company in or about or in the course of its aforesaid business; and generally to do, perform, and transact all acts and things connected with or incidental to the development, prosecution, carrying on, or management of the said business in any or all the departments thereof.

310 Third. The capital stock of the said company shall be one million four hundred thousand dollars.

Fourth. The number of shares of which the said stock shall consist shall be one hundred and forty thousand shares, of ten dollars each share.

Fifth. The said company shall commence on the sixth day of August, in the year one thousand eight hundred and eighty-five, and shall continue in existence for the term of fifty years.

Sixth. The number of trustees who shall manage the concerns of said corporation shall be seven, and the names of those who shall manage the concerns of said corporation for the first year are Horace K. Thurber, William H. Martin, William E. Dodge, jr., D. Willis James, Edward Smith, Charles C. Martin, and Clarence F. Birdseye, all of whom are citizens of the United States and of the State of New York.

Seventh. This company is formed for the purpose of carrying on some part of its business out of the State of New York, to wit: In the town of Bisbee, in the county of Cochise, and Territory of Arizona, and in all such other places or locations wherein it shall hereafter purchase or acquire property. But the principal part of the business of said company within the State of New York is to be carried on at the city of New York, in the county and State of New York; and the office and principal place of business of said company shall be at the said city of New York, in said county and State of New York.

In witness whereof the said incorporators and trustees above named have hereunto subscribed their names and affixed their seals this sixth day of August, one thousand eight hundred and eighty-five.

	HORACE K. THURBER.	[L. S.]
	W. H. MARTIN.	[L. S.]
311	W. E. DODGE, JR.	[L. S.]
	D. WILLIS JAMES.	[L. S.]
	EDWARD SMITH.	[L. S.]
	C. C. MARTIN.	[L. S.]
	CLARENCE F. BIRDSEYE.	[L. S.]

In presence of—
FRANK H. PARSONS.

CITY AND COUNTY OF NEW YORK, *ss:*

Be it known that on the 7th day of August, one thousand eight hundred and eighty-five, before me personally appeared the above-named Horace K. Thurber, W. H. Martin, William E. Dodge, jr., D. Willis James, Edward Smith, Charles C. Martin, and Clarence F. Birdseye, to me severally personally known, and known to me to be the individuals described in and who executed the foregoing certificate in writing, and severally duly acknowledged to me that they signed and executed the same for the purposes therein mentioned.

[SEAL.] FRANK H. PARSONS,
Notary Public, Kings Co. Cert. filed in N. Y. Co.

STATE OF NEW YORK,
City and County of New York, ss:

I, Patrick Keenan, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original certificate of incorporation of the Copper Queen Consolidated Mining Company on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original. Endorsed, filed, and recorded Aug. 7, 1885.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 21st day of Nov., 1885.

[SEAL.] PATRICK KEENAN, *Clerk.*

312 STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the original certificate of incorporation of Copper Queen Consolidated Mining Company with acknowledgment thereto annexed, filed and recorded in this office on the tenth day of August, 1885, and do hereby certify the same to be a correct transcript therefrom and of the whole of the said original.

Witness my hand and the seal of office of the secretary of state at the city of Albany, this 25th day of November, one thousand eight hundred and eighty-five.

[SEAL.] JOSEPH B. CARR,
Secretary of State.

(Endorsed:) (*Endorsed:*) Copper Queen Consolidated Mining Company. Certificate of incorporation.

STATE OF NEW YORK,
Office of Secretary of State.

Filed and recorded Aug. 10, 1885.

AMON G. WOOD,
Deputy Secretary of State.
9 hr. 15 m.

(Endorsed:) 40–3 Copper Queen Con. M'g. Co. Articles of incorporation filed Dec. 11th, 1885, at 9.40 a. m. T. E. Farish, asst. secretary.

TERRITORY OF ARIZONA,
Office of Secretary, ss:

313 I, N. O. Murphy, secretary of the Territory of Arizona, do hereby certify that the above and foregoing is a true and correct copy of the original certificate of incorporation of the Copper Queen Consolidated Mining Co., now on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal. Done at Phoenix, this 21st day of November, 1890.

[Seal of the secretary, Arizona.] N. O. MURPHY,
Secretary of Territory.

[Endorsements upon Exhibit A.]

Filed May 27, 1898. Clinton D. Hoover, clerk.

Certified copy of articles of incorporation of the Copper Queen Consolidated Mining Company.

No. 690. In the supreme court of the Territory of Arizona; Exhibit A.

Filed January 8th, 1900. Thomas Grindell, clerk.

No. 690.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee.

EXHIBIT B.

Certified copy of the articles of incorporation of the Copper Queen Consolidated Mining Company, filed in the office of the county recorder of Cochise County on the 20th day of November, A. D. 1890, admitted in evidence upon the trial of the action in the court below (fol. 66, transcript of record, on appeal), and ordered by the supreme court of the Territory of Arizona to be printed and made a part of the said transcript of record and filed in said cause in the said supreme court.

United States of America, State of New York. By Joseph B. Carr' secretary of state and custodian of the great seal thereof.

I, Joseph B. Carr, secretary of state of the State of New York, do hereby certify that I am secretary of the State of New York; that the certificate and attestation attached to the annexed instrument is my certificate and made by me on the day and date thereof, and that I am
315 the proper officer to make such certificate and attestation, and that the seal attached thereto is the seal of office of the secretary of state of the State of New York, and that I am the proper custodian and keeper of the great seal of said State, and that the said certificate and attestation is in due form.

[The great seal of the State of New York.] In testimony whereof the great seal of the State is hereunto affixed.

Witness my hand at the city of Albany, the 25th day of November, in the year of our Lord one thousand eight hundred and eighty-one.

JOSEPH B. CARR,
Secretary of State.

Certificate of incorporation or articles of association of the Copper Queen Consolidated Mining Company.

STATE OF NEW YORK,
City and County of New York, ss:

Be it known, that we the undersigned, Horace K. Thurber, William H. Martin, William E. Dodge, jr., D. Willis James, and Edward Smith, all of the city, county, and State of New York, and Charles C. Martin and Clarence F. Birdseye, of the city of Brooklyn, county of Kings, and State of New York, who desire to form a corporation pursuant to and in conformity with chapter 40 of the laws of New York for 1848, being the act of the legislature of the State of New York passed on the 17th day of February, one thousand eight hundred and forty eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," and the several acts of the said legislature, amending, modifying, or extending the same

316 or supplementary thereto, do by these presents associate ourselves together and form a body politic and corporate under the name and style of the Copper Queen Consolidated Mining Company, and the following are hereby declared to be:

1st. The corporate name of said company.

2nd. The object for which the company is formed.

3rd. The amount of the capital stock of the said company.

4th. The number of shares of which the said stock shall consist.

5th. The term of existence of the said company.

6th. The number of trustees and their names, who shall manage the concerns of said company for the first year.

7th. The name of the town and county in which the operations of the said company are to be carried on.

First. The corporate name of the said company is hereby declared to be the Copper Queen Consolidated Mining Company.

Second. The objects for which the said company is formed are the obtaining, quarrying, producing, mining, roasting, smelting, treating, and reducing of copper, iron, silver, gold, or other ores and substances, and the manufacturing, procuring, and producing therefrom and disposing of copper, iron, silver, gold, or other metals or substances, and the acquiring, purchasing, and holding, managing, operating, carrying on, and rendering productive all such lands, premises, mining claims, quarries, mineral deposits, lodes, leads or formations, ores, fluxes, or other material, manufactured or unmanufactured, stock, buildings, roads, tracks, tramways, furnaces, smelters, and other machinery, fixtures, property, and effects, as may be necessary, proper, or convenient for the said company in or about or in the course of its aforesaid business; and

317 generally to do, perform, and transact all acts and things connected with or incidental to the development, prosecution, carrying on, or management of the said business in any or all the departments thereof.

Third. The capital stock of the said company shall be one million four hundred thousand dollars.

Fourth. The number of shares of which the said stock shall consist shall be one hundred and forty thousand shares of ten dollars each share.

Fifth. The said company shall commence on the sixth day of August, in the year one thousand eight hundred and eighty-five, and shall continue in existence for the term of fifty years.

Sixth. The number of trustees who shall manage the concerns of said corporation shall be seven, and the names of those who shall manage the concerns of said corporation for the first year are Horace K. Thurber, William H. Martin, William E. Dodge, jr., D. Willis James, Edward Smith, Charles C. Martin, and Clarence F. Birdseye, all of whom are citizens of the United States and of the State of New York.

Seventh. This company is formed for the purpose of carrying on some part of its business out of the State of New York, to wit: In the town of Bisbee, in the county of Cochise and Territory of Arizona, and in all such other places or locations wherein it shall hereafter purchase or acquire property; but the principal part of the business of said company within the State of New York is to be carried on at the city of New York, in the county and State of New York; and the office and prin-

cipal place of business of said company shall be at the said city of New York, in said county and State of New York.

318 In witness whereof the said incorporators and trustees above named have hereunto subscribed their names and affixed their seals this sixth day of August, one thousand eight hundred and eighty-five.

HORACE K. THURBER.	[L. S.]
W. H. MARTIN.	[L. S.]
W. E. DODGE, Jr.	[L. S.]
D. WILLIS JAMES.	[L. S.]
EDWARD SMITH.	[L. S.]
C. C. MARTIN.	[L. S.]
CLARENCE F. BIRDSEYE.	[L. S.]

In presence of—
FRANK H. PARSONS.

CITY AND COUNTY OF NEW YORK, *ss:*

Be it known that on the 7th day of August, one thousand eight hundred and eighty-five, before me personally appeared the above-named Horace K. Thurber, W. H. Martin, William E. Dodge, jr., D. Willis James, Edward Smith, Charles C. Martin, and Clarence F. Birdseye, to me severally personally known and known to me to be the individuals described in and who executed the foregoing certificate in writing, and severally duly acknowledged to me that they signed and executed the same for the purposes therein mentioned.

[SEAL.] FRANK H. PARSONS,
Notary Public, Kings Co., Cert. filed in N. Y. Co.

STATE OF NEW YORK,
City and county of New York, ss:

I, Patrick Keenan, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original certificate of incorporation of the Copper Queen Consolidated Mining Company on file in my office,

319 and that the same is a correct transcript therefrom and of the whole of such original. Endorsed, filed, and recorded Aug. 7, 1885.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 21st day of Nov., 1885.

[SEAL.] PATRICK KEENAN, *Clerk.*

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the original certificate of incorporation of Copper Queen Consolidated Mining Company with acknowledgement thereto annexed, filed and recorded in this office on the tenth day of August, 1885, and do hereby certify the same to be a correct transcript therefrom and of the whole of the said original.

Witness my hand and the seal of office of the secretary of state at the city of Albany, this 25th day of November, one thousand eight hundred and eighty-five.

[SEAL.] JOSEPH B. CARR,
Secretary of State.

Filed and recorded at request of Ben Williams, Dec. 4, A. D. 1885.

A. T. JONES,
County Recorder.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, W. F. Bradley, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the articles of incorporation of the Copper Queen
320 Consolidated Mining Company as appears of record now in my office, in book 1, page 324, of incorporations.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in Tombstone, this 20th day of November, A. D. 1890.

W. F. BRADLEY,
County Recorder.

[Recorder Cochise County, Arizona.]

[Endorsements upon Exhibit B.]

Filed May 27, 1898. Clinton D. Hoover, clerk.

Certified copy of articles of incorporation of the Copper Queen Consolidated Mining Company.

No. 690. In the supreme court of the Territory of Arizona.

Exhibit B. Filed January 8th, 1900. Thomas Grindell, clerk.

321 No. 690.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee

EXHIBIT C.

Certified copy of the original appointment of Benjamin Williams as agent of the Copper Queen Consolidated Mining Co. as it appears of record in the office of the secretary of the Territory of Arizona, and was filed therein on the 21st day of November, A. D. 1890, admitted in evidence upon the trial of the action in the court below (fols. 66 and 67, transcript of record, on appeal), and ordered by the supreme court of the Territory of Arizona to be printed and made a part of the said transcript of record, and filed in said cause, in the said supreme court.

Appointment of corporate agent by the Copper Queen Consolidated Mining Co.

At a meeting of the board of directors of the Copper Queen Consolidated Mining Company, a corporation organized under the laws of the State of New York, and engaged in carrying on its corporate business in the county of Cochise, in the Territory of Arizona, held at the office of

the company in the city of New York, on this twelfth day of February, A. D. 1890, the following resolution was duly adopted by such company:

322 "Resolved, That Benjamin Williams, a bona fide resident of the county of Cochise, in which county this appointment is to be filed, and whose place of residence in said county is at Bisbee, said county, be, and he hereby is, appointed the lawful agent of the Copper Queen Consolidated Mining Company, upon whom all notices and processes, including service of summons, may be served, and when so served shall be deemed, taken, and held to be a lawful personal service on such corporation for all purposes whatsoever."

In witness whereof the said Copper Queen Consolidated Mining Company has caused these presents to be signed by its president and secretary, and its corporate seal to be attached, at the city of New York, this twelfth day of February, in the year of our Lord one thousand eight hundred and ninety.

[Corporate seal.] J. DOUGLAS, *President.*
J. VAN VLECK, *Secretary.*

(Endorsed:) Copper Queen Consolidated Mining Company. Appointment of Benjamin Williams as corporate agent.

(Endorsed:) Filed in the office of the secretary of the Territory of Arizona, this 10 day of Mar., A. D. 1890, at 4 p. m. N. O. Murphy, secretary of Territory.

Recorded in Book of Incorporations at page 448.

TERRITORY OF ARIZONA, *Office of Secretary, ss:*

323 I, N. O. Murphy, secretary of the Territory of Arizona, do hereby certify that the above and foregoing is a true and correct copy of the original appointment of Benjamin Williams as agent of the Copper Queen Consolidated Mining Company, now on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal. Done at Phoenix this 21st day of November, 1890.

[Seal of the secretary, Arizona.] N. O. MURPHY,
Secretary of Territory.

[Endorsements upon Exhibit C.]

Filed May 27, 1898. Clinton D. Hoover, clerk.

Certified copy Copper Queen Consolidated Mining Company to Ben Williams. Designation of agent.

No. 690. In the supreme court of the Territory of Arizona. Exhibit C. Filed Jan'y 8th, 1900. Thomas Grindell, clerk.

Filed this 31st day of Jan., 1900. Thomas Grindell, clerk.

324 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT, *vs.* THE COPPER QUEEN CONSOLIDATED MINING Company, a corporation, appellee.	Judgment. Rendered March 28th, 1900.

This cause having been heretofore submitted and by the court taken under consideration and the court having considered the same and being

fully advised in the premises, it is ordered that the judgment of the district court be, and the same is hereby, affirmed.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT, *vs.* COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee.	Number 690.

Appeal from the district court of Pima County, Hon. George R. Davis, judge.

R. E. Morrison, U. S. atty., Thos. D. Bennett, asst. atty., for appellant.

William Herring, Sarah H. Sorin for appellee, of counsel.

325 OPINION BY SLOAN, J.

The United States, on March 6, 1895, brought suit in the district court of the first judicial district against one D. D. Ross and the Copper Queen Consolidated Mining Company, a corporation, to recover the sum of $183,070.50, the value of certain timber alleged to have been wrongfully cut and removed from the public lands of the United States by said defendants. A trial was had in November, 1895, which resulted in the disagreement of the jury, whereupon the further trial of the case was continued until the 25th day of May, 1898, when the plaintiff was granted leave to file, and did file, an amended complaint, which, omitting the title of the court and the cause, was as follows:

"I.

"The defendant, The Copper Queen Consolidated Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the county of Cochise, Territory of Arizona.

"II.

"That said defendant wrongfully cut and caused to be cut and removed from the surveyed and unsurveyed public lands of the United States of America a large quantity of timber, to wit: Five millions nine hundred and five thousand five hundred feet of timber.

"III.

"That said timber was by the defendant wrongfully cut and caused to be cut from the following surveyed and unsurveyed public lands of the United States of America, to wit: That certain land lying in a cañon in the Chiricahua Mountains in, east of, and adjacent to townships seventeen and eighteen south, ranges twenty-nine and thirty east, of Gila and Salt River base and meridian, about sixty miles southeast from the
326 town of Willcox on the Southern Pacific Railway and on what is known as Rock Creek, all in the county of Cochise, Territory of Arizona.

"IV.

"That the value of the timber so wrongfully cut and caused to be cut and removed from the said public lands of the United States of America was the sum of thirty-one dollars per thousand feet, and of the aggregate value of one hundred and eighty-three thousand seventy and fifty one-hundredths dollars ($183,070.50) lawful money of the United States of America.

"V.

"That all of said timber aforesaid wrongfully cut and caused to be cut and removed from the surveyed and unsurveyed public lands aforesaid by defendant belonged to and was the property of the United States of America, and all said timber was cut, removed, taken by, delivered to, and used and consumed by defendant, Copper Queen Consolidated Mining Company.

"VI.

"That at the time the timber aforesaid was wrongfully cut, caused to be cut, removed, taken by, delivered to, and used and consumed by the defendant from the lands aforesaid the said lands were surveyed and unsurveyed public lands of the United States of America, and defendant well knew that said timber was the property of the United States and was wrongfully cut, caused to be cut, removed, taken by, delivered to, and used and consumed by defendant Copper Queen Consolidated Mining Company.

"Wherefore plaintiff prays judgment against defendant for the sum of one hundred and eighty-three thousand seventy and fifty one-hundredths dollars ($183,070.50) lawful money of the United States of America, and for its costs and disbursements in this action incurred."

To the amended complaint the defendant company filed its
327 answer, denying that it had cut or removed, or caused to be cut or removed, the timber or any of the timber mentioned in the complaint, and further denying that the said timber or any part of it was cut upon the surveyed public lands of the United States, but alleging that one Daniel D. Ross, formerly made a defendant in the action, but since deceased, cut and removed, and caused to be cut and removed from the unsurveyed public lands of the United States, lying in a cañon in the Chiricahua Mountains, known as Rock Creek, and within the county of Cochise, the quantity of timber mentioned in the complaint. That this timber was sold and delivered to it by said Ross, at the town of Bisbee, in said Territory, and was used and consumed by it wholly for mining and other domestic purposes within the Territory.

The answer further alleged that Ross cut and removed said timber from the public mineral lands of the United States under the authority of the act of Congress of June 3, 1878. That said Ross, at the time he so cut and removed said timber, was a citizen of the United States of America, and that at the time both the defendant and said Ross were bona fide residents of the Territory. That the portion of the said Chiricahua Mountains from which the said timber was cut and removed was

not subject to entry under the existing laws of the United States, except for mineral entry. That said land from which said timber was cut was within the organized mining districts and was in the vicinity of and adjacent to valuable known and recognized mines, and were and are mineral lands within the meaning of said act of Congress.

The cause was tried to a jury upon the amended complaint and answer and a verdict found for the defendant. The United States appeals from the order overruling its motion for a new trial, and from the judgment.

The act of Congress of June 3, 1878, reads as follows:

328 "All citizens of the United States, and other persons bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: Provided, the provisions of this act shall not extend to railroad corporations."

The appellant assigns as error that the proof in the case failed to show authority on the part of Ross or the defendant to fell and remove the timber in question, for the reason that it was not shown that the lands from which said timber was taken were of the class of lands mentioned in said act, in that it was not shown that said lands were "mineral, and not subject to entry under existing laws of the United States, except for mineral entry." Upon this subject the trial court charged the jury as follows:

"Proof of the existence of some measure of minerals in the lands from which the timber was cut, or proof of traces, indications, or possibilities that said land contained valuable mineral deposits, or that the lands in question are high, rugged, rough, and precipitous can not

329 in itself impress said lands with a mineral character; mineral in sufficient quantities to justify exploration and development and in quantities which it will pay to work must be shown to exist, and the existence thereof in the land must be demonstrated as a present fact in order to justify the cutting of timber therefrom, or the purchase of such timber after being cut under the act of June 3rd, 1878.

"The mere fact that portions of the land from which the timber was cut contained particles of gold or other valuable mineral deposits or veins of gold-bearing quartz would not necessarily impress it with the character of mineral land as herein defined and within the meaning of the act of June 3rd, 1878. It must at least be shown that said lands contained metals in quantities sufficient to render it available and valuable for mining purposes."

These instructions embrace a full and accurate definition of the term "mineral land" as used in said act of Congress and other statutes of the United States.

A mass of testimony was introduced at the trial on the part of the defendant and on the part of the plaintiff tending to show on the one part the mineral character of the land and on the other the nonmineral character of the land. A consideration of the evidence satisfies us that the geological conditions exist at the place where the timber was cut which render it probable that mineral in paying quantities may exist; that discoveries of mineral of more or less value have been made, but that it is still to some extent problematical as to whether paying mines will ever be discovered and developed thereon. Before, however, disturbing the verdict upon the ground of the insufficiency of the evidence, it ought to appear that, conceding the testimony adduced by the defendant
330 to show the mineral character of the lands to be true, the fact is still unproven. We can not say from a consideration of the evidence that the jury disregarded the law defining the term "mineral lands" as used in the act of June 3rd, 1878, or that their finding that the lands in question were mineral in character is not justified by the evidence.

It is contended by counsel for appellant that the verdict of the jury should be set aside and a new trial granted because the defendant failed to prove that D. D. Ross, who was shown to have cut and removed the timber in question, and from whom the defendant purchased the same, was a citizen of the United States and a bona fide resident of the Territory. The contention on the part of the appellant is that the authority granted in said act of June 3rd, 1878, is limited by the terms of the act to a citizen of the United States who is also at the time a bona fide resident of the Territory. The language of the act is: "All citizens of the United States and other persons bona fide residents, etc." The language used can have no other meaning than as including aliens as well as citizens, provided they be bona fide residents of the States and Territories and districts mentioned, among the persons thus authorized to fell and remove any timber or other trees on the public mineral lands.

No case has been cited by appellant in which any of the Federal courts have construed the act of June 3, 1878, as limiting the authority to cut timber therein granted to those persons who are both citizens and bona fide residents of the States, Territories, or districts mentioned. While dicta may be found which would imply that this construction has been given, it does not appear that the precise question as to whether an alien who is a bona fide resident of one of the States or Territories named is prohibited by the terms of said act of June 3, 1878, from cutting timber upon public mineral lands. The case of North Pac. R. R. Co. v. Lewis, 162 U. S., 366, cited by counsel for appellant, did not involve
331 the question in point in that the persons charged with having cut the wood which was the subject-matter of the action were both citizens of the United States and residents of Montana, where the cutting was done The learned justice who wrote the opinion in that case, we think inadvertently, in stating in general terms the provisions of the act of June 3, 1878, omitted to give any meaning to the term "and other persons" used in the act. Dicta may be found in other decisions construing the act as we are construing it:

U. S. v. Smith, 11 Fed., 487.
U. S. v. Eureka & P. R. Co., 40 Fed., 419.
U. S. v. Richmond Mg. Co., 40 Fed., 415.

Holding, therefore, as we do, that a bona fide resident of the Territory, whether he be a citizen or not, is privileged to cut timber from the public mineral lands by the terms of said act, the failure of the defendant to prove the citizenship of Ross is of no consequence. Ross, in his deposition introduced at the trial, stated that he had "moved" into Rock Creek in 1883 and began the cutting of timber and continued to cut timber and supply the defendant with the same until 1893. The term "moved," as used by Ross in its connection, no doubt had reference to his change of residence. This, in connection with the fact that he was for ten years engaged in an extensive lumbering business at Rock Creek is sufficient, in our judgment, to establish his bona fide residence within the Territory.

The appellant requested the trial court to instruct the jury as follows:

"You are further instructed that by virtue of said act and pursuant to the authority therein imposed the Secretary of the Interior thereafter prescribed certain rules and regulations which thereupon became laws of the same force and effect as the statute itself. That portion
332 of the said regulations to which the defendant must conform in order to justify under the license granted by the statute, and which is applicable to the facts in this case, is found in the first, second, and third paragraphs of said regulations, and is as follows:

"1st. The act applies only to the States of Colorado and Nevada and the Territories of New Mexico, Arizona, Utah, Wyoming, Idaho, and Montana, and other mineral districts of the United States not specially provided for.

"2nd. The land from which timber is felled or removed must be known to be of strictly mineral character, and that it is not subject to entry under the existing laws of the United States except for mineral entry.

"3rd. No person, not a citizen or bona fide resident of a State, Territory, or other mineral district provided for in said act, is permitted to fell or remove timber from mineral lands therein. And no person, firm, or corporation felling or removing timber under this act, shall sell or dispose of the same, or the lumber manufactured therefrom, to any other person than citizens and bona fide residents of the State or Territory where such timber is cut, nor for any other purpose than the legitimate use of said purchaser for the purposes mentioned in said act."

This instruction was refused, and the refusal is made the basis for an assignment of error by appellant. It is true that the rules and regulations prescribed by the Interior Department by the terms of the act of June 3, 1878, so far as they may relate to the protection of the timber and of the undergrowth growing upon such mineral lands and for other purposes, have the effect of law. But it does not follow that the Secretary of the Interior may prescribe from what lands timber may
333 be cut, or in any way enlarge or detract from the privileges granted in said act. The trial court did instruct the jury fully as to the provisions of the act of June 3, 1878. The instructions asked as being a portion of the regulations imposed by the Secretary of the Interior in effect were given by the court in other instructions, except that, in the second paragraph of the regulations given in the instruction, the term "strictly mineral" is used in defining the character of the land

from which timber may be felled. If the term "strictly mineral," as used in the regulation of the Secretary, is to be construed as in any manner modifying or limiting the act of June 3, 1878, the instruction was properly refused, for the reason that under the terms of the act it is not within the province of the Secretary to make any such regulation; the act itself determined from what kind or character of lands timber might be cut. If we construe the term "strictly mineral" to mean nothing more than lands upon which timber may be cut shall be mineral and not subject to entry under existing laws of the United States except for mineral entry, the definitions given by the court in his other instructions, some of which we have given, fully covered the ground, and there was no necessity or propriety in further charging the jury upon this subject.

The refusal of the trial court to give the instruction asked constitutes no ground of error.

The judgment is affirmed.

RICHARD E. SLOAN, *A. J.*

We concur:

WEBSTER STREET, *C. J.*
FLETCHER M. DOAN, *A. J.*

Filed March 28, 1900. Thomas Grindell, clerk.

334 UNITED STATES OF AMERICA, APPELLANT, *vs.* COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee. } Minute entry. March 28th, 1900.

In this cause it is ordered that Wm. Herring, esq., attorney for appellee, have permission to file motion pertaining to costs by June first.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT, *vs.* COPPER QUEEN MINING COMPANY, CORPORATION, appellee. } No. 690.

Motion for rehearing.

Comes now the United States of America and files this its motion for a rehearing in the above-entitled cause, and shows:

1. That William Herring and Sarah H. Sorin are the attorneys of record for the above-entitled appellee, and are residents of the city of Tucson, Territory of Arizona.

2. The appellant herein respectfully suggests to the attention of this court and the judges thereof that in deciding that the evidence produced before the jury in the trial of this cause below failed to show that the land from which the timber was cut was mineral in character, and
335 that the jury did not disregard the law defining the term mineral lands as used in the act of June 3, 1878; it did so, it is respectfully submitted, in the face of the record in this case and contrary to all of the evidence in the cause.

In the decision we find this language: "That discoveries of mineral of more or less value have been made, and that it is still problematical to some extent as to whether paying amounts will ever be discovered and developed thereon; but, however, to disturb the verdict upon the ground of the insufficiency of the evidence, it ought to appear that, conceding the testimony adduced by the defendant to show the mineral character of the land to be true, the fact is still unproven.

In the first place, the burden of proof was upon the appellee herein to establish the mineral character of the land, and this means of course that the appellee must have shown this by the preponderance of the evidence. When, therefore, the court says that the fact is still unproven, then the evidence in the case clearly shows, according to the court's own decision, that the defendant failed to establish by the evidence the mineral character of the land in question. The Government was not called upon to prove the nonmineral character of the land, but the defendant and appellee was required, under the rules of evidence in this class of cases, to establish, by the preponderance of the evidence, that the land was mineral. The first sentence from the above quotation makes it clear that the judgment of this court should have been in favor of the Government, because if "the fact is still unproven" that the land is mineral in character, then this court should have rendered judgment in favor of the Government and reversed the case.

3. This court, in holding that the act of June 3, 1878, permits the felling and removing of timber from public mineral lands by either citizens
336 or aliens, provided they are bona fide residents of the States and Territories mentioned in said act, reads out of said act the first clause therein, to wit: "All citizens of the United States and other persons," for the reason that by leaving out said phrase this act of Congress will read intelligently by beginning with the words "bona fide residents of the State," etc. This decision in effect says that the words "all citizens of the United States and others" are not in the act and were not intended to be in the act, and that Congress did a useless and unnecessary thing in putting said language into the said act. To quote the argument of the learned counsel for appellee, particular word or words followed by general word or words in the statute limits the meaning of the general word or words, and in effect does away with such general words. The language of this act in the first line is one of the best examples of this principle that can be found, and we submit that on appellee's argument alone the construction placed by the court upon this portion of the act is erroneous and contrary to law. If Congress had intended that all classes of persons, provided they were bona fide residents of the States and Territories mentioned in the act, should have the privilege of cutting timber from public mineral lands, then the words "all citizens of the United States and other persons" would never have been put into this act, for the reason that said words would be unnecessary, as the term "bona fide residents" would have covered both citizens and aliens, and corporations, for that matter. It may be added that this construction of the act of June 3, 1878, as given by our Supreme Court, is not sustained in any manner, either by all of the decisions found in the cases cited upon this point for or against in the briefs of appellant and appellee, and is contrary to the most ordinary rules for the construction of acts of Congress.

337 4. It is not clear to counsel for appellant how this Supreme Court could find that Ross was a bona fide resident of the Territory of Arizona at the time when he began cutting this timber. A careful reading of the act of June 3, 1878, will show that a person must be a bona fide resident of the State or Territory mentioned in the act at the time that he begins the cutting; in other words, he must have established a residence in good faith for all purposes, not solely for the purpose of unlawfully cutting timber. The first we hear of Ross is that he "moved" into Rock Creek Canyon and began cutting timber upon what is contended by appellants to be nonmineral lands; the last we hear of him is when he stops cutting the same, about ten years later. His whereabouts before and after this cutting are not disclosed by the evidence, and we contend that the record is silent upon the residence of Ross in the light of the act of June 3, 1878. He moved in solely, from the record, for the purpose of cutting timber. When he finished cutting timber, his whereabouts are unknown. We insist also that the court is reading out of the statute the words "bona fide" in arriving at the conclusion expressed in the opinion that the mere entry into Rock Creek Canyon at the time the timber was begun to be cut made the man who violated the law a bona fide resident, when his residence, so established for the sole purpose of cutting the timber, is complained of.

5. The court erred in holding that the action of the lower court in refusing to give the instruction that the rules and regulations adopted by the Secretary of the Interior pursuant to the act of June 3, 1878, and under the authority of said act, was not ground for reversal, the decision of this court being in effect that such rules and regulations are not necessarily a part of the law.

Respectfully submitted.

R. E. MORRISON,
THOS. D. BENNETT,
U. S. Attorneys.

338 (Endorsed:) No. 690. In the supreme court of the Territory of Arizona. United States of America vs. Copper Queen Mining Co. Motion for rehearing. R. E. Morrison, Thos. D. Bennett, U. S. attys. Filed April 9, 1900. Thomas Grindell, clerk.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT, *vs.* COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee.	No. 690.

Precpt.

The Territory of Arizona to the Sheriff of Pima County, greeting:

Whereas, on an appeal in the above-entitled cause by the appellant herein, the supreme court of the Territory of Arizona did, on the 28th day of March, 1900, render judgment in said cause, affirming the judgment of the court below; and whereas the above-named appellant did, on

the 9th day of April, 1900, and within fifteen days after the rendition of said judgment by said supreme court, file in the office of the clerk of said court its certain motion for rehearing of said cause, a duly certified copy of which motion accompanies this precept:

Now, therefore, you are hereby commanded that you deliver said certified copy of the said motion for rehearing to William Herring,
339 attorney of record for appellee, whose residence and place of business is Tucson, Arizona, and that you make the return of this precept, with your proceedings thereunder entered thereon, to this court forthwith.

Witness, Honorable Webster Street, chief justice of the supreme court of the Territory of Arizona, and the seal of said court.

Done at Phoenix, the capital of Arizona, this 9th day of April, 1900.

[SEAL.] THOMAS GRINDELL,
Clerk of the Supreme Court of Arizona.

TERRITORY OF ARIZONA, *County of Pima, ss:*

I hereby certify that I received the annexed precept on the 10th day of April, 1900, and personally served the same on the 13th day of April, 1900, on William Herring, the attorney of record for the appellee, personally, by delivering it and leaving it with said William Herring, in Pima County, a duly certified copy of the motion for rehearing in this action.

L. W. WAKEFIELD, *Sheriff.*

Filed Apr. 19, 1900. Thomas Grindell, clerk.

340 UNITED STATES OF AMERICA, APPELLANT, *vs.* COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee. } Order denying motion for rehearing. June 2nd, 1900.

In this cause it is ordered that the motion for rehearing filed herein by appellant be and the same is hereby denied.

The following order was also made in this case for this day, to wit:

Title of cause.

On motion of William Herring, esq., attorney for appellee herein, it is ordered that he have further time in which to file motion to retax costs.

Also the following order was made in this cause for this day, to wit:

Title of cause.

Mr. T. D. Bennett, attorney for appellant herein, in open court gave notice of appeal in this cause to the Supreme Court of the United States and prayed the court for an allowance of such an appeal. Whereupon it was ordered by the court that appellant herein be allowed an appeal to the Supreme Court of the United States from the judgment of this court herein.

341 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, PLAINTIFF AND APPELLANT,
vs.
THE COPPER QUEEN CONSOLIDATED MINING COMPANY, defendant and appellee.

Petition for writ of error.

Comes now the above-named plaintiff, the United States of America, by Robert E. Morrison, United States attorney for the Territory of Arizona and attorney for plaintiff, and complains that in the record and proceedings had in this cause in said court, and also in the rendition of the judgment in the above-entitled cause in said supreme court on the 28 day of March, 1900, the same being one of the days of the regular January, 1900, term of said court, against the said plaintiff, affirming the judgment of the district court of the first judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in district and circuit courts of the United States, and which judgment in said last-mentioned trial court was rendered upon a verdict of the jury which tried said cause in the court below, the matter in dispute exceeding the sum of five thousand dollars, manifest error hath happened, to the great damage of said plaintiff:

Wherefore said plaintiff prays for the allowance of a writ of error and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States;

And plaintiff in error further prays for the correction of the error so complained of, and for the reversal of the judgment of affirmance
342 of said supreme court of the Territory of Arizona.

ROBT. E. MORRISON,
United States Attorney for Arizona and Attorney for Plaintiff.

Allowed:

WEBSTER STREET,
Chief Justice.

Filed Sept. 29th, 1900. Thomas Grindell, clerk. By Angie B. Parker, deputy.

In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee.

No. 690. Motion vacating order fixing costs.

Comes now the appellee in the above cause and moves this honorable court to vacate and set aside the order made in the above cause directing appellee to pay to the clerk of the supreme court the costs and fees of said clerk for filing the record in said cause, transmitted to said supreme court by the clerk of the district court of the first judicial district of the Territory of Arizona, in and for the county of Pima.

The grounds of the above motion are as follows, to wit:

Under the existing statutes of the Territory, upon an appeal being taken from the judgment of the district court in said Territory to the supreme court of the Territory, the clerk of the district court is required to transmit the record of the cause in the court below.

343 The appellee in this case, not having been the moving party in the court below, but having been the successful party in the appellate court, is not chargeable with any of the costs upon the appeal to the supreme court.

The record in question was transmitted by the clerk of the court below in detached and separate papers, and the charge for the filing of each separate paper of the record was made by the clerk of the supreme court for filing the same. The appellee is not responsible for the manner in which the record of the cause in the court below was transmitted to this court. No duty is cast upon the appellee to see that the record of the cause in the court below is transmitted to this court.

Wherefore counsel for appellee prays that an order may be made in the premises vacating and setting aside the order heretofore made herein taxing the costs of the transmission of said record to appellee.

Dated November 5, 1900.

WILLIAM HERRING,
Attorney for Appellee.

Filed Nov. 6, 1900. Thomas Grindell, clerk.

344 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT, *vs.* COPPER QUEEN CONSOLIDATED MINING COMPANY, a corporation, appellee.	No. 690.

Comes now the above-named appellant and objects to any order being made setting aside the order made in the above-entitled cause directing the appellee to pay to the clerk of the supreme court the costs and fees of said clerk for filing the record in said cause transmitted to said supreme court by the clerk of the district court of the first judicial district of the Territory of Arizona, in and for the county of Pima, for the following reasons, to wit:

1st. Because the appeal herein was not taken in accordance with the act of 1897, but was taken on bill of exceptions and statement of facts.

2nd. Because the appellant did not request nor direct the clerk of said district court to transmit to said clerk of the supreme court the original files and papers in said cause.

3rd. Because said appellee, through its counsel, directed the attention of the clerk of said district court to the fact that said original files had not been forwarded to the clerk of the supreme court.

4th. Because said files were sent up and filed in the office of the clerk of the supreme court as the result of said suggestion on the part of appellee, and if said clerk of said supreme court is entitled to any fees for filing said papers said appellee should pay the same.

ARGUMENT.

345 Counsel for appellant directs the attention of your honors to the fact that the appeal in the above-entitled cause was taken on bill of exceptions and statement of facts, and a transcript of the record from the lower court was filed in this court and the appeal was heard upon said record.

The appellant also suggests that appellee filed a motion to dismiss the appeal herein on the ground that appellant had failed to comply with the law of 1897 relating to appeals to the supreme court, and that your honors overruled said motion, holding that the act of 1897 did not repeal the former laws of this Territory permitting appeal by bill of exceptions and statement of facts.

It is conceded by appellee, as counsel for appellant understands it, that the original files in this cause came to the office of the clerk of the supreme court because of the suggestion of counsel for appellee made to the clerk of the district court.

According to the ruling of your honors, the sending up of said original files was a useless proceeding, and for the costs incidental thereto appellant is in no way responsible, but appellee is, and should be, held responsible and required to pay whatever costs the clerk is lawfully entitled to charge.

Respectfully submitted.

ROBT. E. MORRISON,
United States Attorney.

Appellant's objections to setting aside order for appellee to pay costs. Filed Nov. 9, 1900. Thomas Grindell, clerk.

346 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT, *vs.* THE COPPER QUEEN CONSOLIDATED MINING Company, a corporation, appellee.	No. 690. Minute entry. Nov. 8th, 1900.

Mr. Robert E. Morrison, attorney for appellant herein, moved the court for order for writ of error, which was taken under consideration by the court.

On Friday, November 9th, 1900, that being a regular judicial day of the November term, 1900, of said court, the following record in this case for this day was made, to wit:

Title of cause.

It is ordered that the motion filed herein by appellee to set aside order for appellee to pay certain costs, be and the same is hereby denied.

Upon motion of Robert E. Morrison, attorney for appellant herein, and upon the filing of a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment of affirmation hereinbefore entered herein.

347 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, PLAINTIFF AND APPELLANT,
vs.
THE COPPER QUEEN CONSOLIDATED MINING COMPANY, defendant and appellee.

Order granting writ of error.

Upon motion of Robert E. Morrison, attorney for plaintiff herein, and upon the filing of a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment of affirmation hereinbefore entered herein.

Done in open court at Phœnix, Arizona, this 9th day of November, 1900.

WEBSTER STREET,
Chief Justice.

Filed Nov. 9, 1900. Thomas Grindell, clerk.

348 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN error,
vs.
THE COPPER QUEEN CONSOLIDATED MINING Company, defendant in error.

Assignment of errors.

The plaintiff in error, who was the plaintiff and appellant in the court below, comes and makes the following assignment of errors alleged to have been committed by the supreme court of the Territory of Arizona in affirming the judgment of the trial court:

The supreme court of the Territory of Arizona, sitting as a court of appeals and review, and reviewing the proceedings of the district court of the first judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States of America as is vested in district and circuit courts of the United States, on appeal of the plaintiff in error herein, erred in affirming the judgment of said district court, as follows:

ASSIGNMENT NO. I.

Erred in sustaining the judgment of said district court in which the court rendered judgment in favor of defendant in error and by so doing sustained the said district court in denying plaintiff in error's motion made at the close of the evidence in said cause, that the court in-
349 struct the jury to find on the evidence adduced a verdict for the Government for the following reasons:

a. That the defendant in error had failed to establish any authority or license to cut timber under the act of Congress in that behalf.

b. That the burden was upon the defendant to show the mineral character of the land, and defendant in error had utterly failed to establish its mineral character.

c. The cutting, taking, and removing of the timber having been admitted, the plaintiff was entitled to a verdict on the evidence adduced.

ASSIGNMENT NO. II.

Said supreme court erred in affirming the action of the trial court in refusing to give that portion of plaintiff's first instruction which set forth in toto the rules and regulations of the Secretary of the Interior relating to the cutting of timber on public lands under the act of Congress of June 3d, 1878, for the reason—

That the court took judicial notice of said rules and regulations, and the same are a part of the law of this case.

ASSIGNMENT NO. III.

Erred in affirming the judgment of the trial court because the judgment of said trial court is contrary to the facts in this:

a. That the defendant in error had totally failed on the trial to establish any authority or license to cut timber under the act of Congress of June 3d, 1878.

350 b. That the defendant did not prove by a preponderance of the evidence that the land from which the timber was cut was mineral land as defined by the court's instructions and as required by law to be, the evidence for the Government being overwhelming that the land was nonmineral.

c. That there was no evidence of the citizenship of Ross, who cut the timber.

d. That said judgment is contrary to the instructions of the court as given to the jury in every respect and upon every proposition of law therein contained.

ASSIGNMENT NO. IV.

Erred by its affirming the judgment of the court below, thus sustaining the action of the trial court in refusing to grant plaintiff in error's motion to set aside the verdict and judgment in said trial court and grant a new trial therein, and plaintiff assigns as a reason therefor all the reasons in said motion set forth, and also each and every of the assignments of error hereinbefore made, with a like effect as if the same were written at length herein.

ASSIGNMENT NO. V.

Erred in affirming the judgment of the court below because,

a. Said Supreme Court, according to its written opinion as found in the transcript, finds the following conclusion of fact:

"A consideration of the evidence satisfies us * * * that it is still to some extent problematical as to whether paying mines will ever be discovered and developed thereon."

351 Notwithstanding, the said Supreme Court says that the law of this case on this subject is as contained in the court's instruction to the jury, to wit:

"Mineral in sufficient quantities to justify exploration and development

and in quantities which will pay to work must be shown to exist, and the existence thereof must be demonstrated as a present fact in order to justify the cutting of timber therefrom or the purchase of such timber after being cut, under the act of June 3d, 1878."

ASSIGNMENT NO. VI.

Erred in construing the act of Congress of June 3d, 1878, to mean that any person, whether citizen or alien, provided that he is a bona fide resident of the Territories or districts mentioned in said act, is authorized to cut timber under said act, for the reasons:

a. That said act of June 3d, 1878, limits the right to cut timber on mineral lands to individuals, citizens of the United States, and bona fide residents of the Territories or districts mentioned in the act.

b. That said act does not permit aliens to cut timber.

c. That the words "and other persons" as contained in said Act of June 3d, 1878, are intended to apply not to individuals, but to corporations.

ASSIGNMENT NO. VII.

Erred in affirming said judgment by sustaining the order of said court in overruling plaintiff in error's motion for a new trial, for the reason, among other things,

352 That the said trial court in charging the jury as to the law of the case instructed "And should the evidence in this case fail to establish that at the time of the cutting and removal of said timber the said Daniel D. Ross was a citizen of the United States and a bona fide resident of the Territory of Arizona, you must find for the plaintiff without regard to the mineral or nonmineral character of the land."

The evidence on said trial not having by even one word contained proof of the citizenship of said Ross, the verdict of the jury being for defendant in error is in defiance of this plain instruction.

For all of which plaintiff in error prays a reversal.

ROBT. E. MORRISON,
U. S. Attorney for Arizona, and Attorney for Plaintiff in Error.

Filed Nov. 10, 1900. Thomas Grindell, clerk.

353 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, Thomas Grindell, clerk of the supreme court of the Territory of Arizona, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 352, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States of America, plaintiff in error, against the Copper Queen Consolidated Mining Company, a corporation, defendant in error, as the same remain of record and on file in said office.

Also that the citation, writ of error, and return to writ of error, attached hereunto, are the original citation, writ of error, and return to writ of error issued by said supreme court of the Territory of Arizona.

In testimony whereof, I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed at the city of Phoenix, in the Territory of Arizona, this 28th day of November, A. D. 1900.

[SEAL.] THOMAS GRINDELL,
Clerk of the Supreme Court of the Territory of Arizona.

354 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Copper Queen Consolidated Mining Company, defendant in error, and William Herring, its attorney, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within sixty days from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the supreme court of the Territory of Arizona, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the party in this behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 9th day of November, A. D., 1900, and of the independence of the United States the one hundred twenty-fifth.

[SEAL.] WEBSTER STREET,
Chief Justice of the Supreme Court of the Territory of Arizona.

Witness the seal of said court.

THOMAS GRINDELL,
Clerk Supreme Court of Arizona.

Service of the within citation and receipt of a copy thereof is hereby admitted this 13th day of November, 1900.

WILLIAM HERRING,
Attorney for defendant in error.

355 (Indorsed:) No. 690. Supreme court Arizona. U. S. vs. Copper Queen, etc. Citation filed November 17th, 1900. Thomas Grindell, clerk.

356 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of Arizona, greeting:

Because in the record and proceedings and also in the rendition of the judgment of affirmation which is in said supreme court before you, being the highest court of law or equity of said Territory in which a decision could be had in said suit between the United States of America, plaintiff

in error, and the Copper Queen Consolidated Mining Company, defendant in error, a manifest error hath happened to the great damage of the said United States of America, plaintiff in error, as by its complaint and petition appears;

We, being willing that error if any hath been shall be duly corrected and full and speedy justice done the party aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the 7th day of January, 1901, in said Supreme
357 Court of the United States, to be then and there held, that the record and proceedings being inspected, the said Supreme Court of the United States may cause to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 9th day of November, in the year of our Lord nineteen hundred.

[SEAL.] THOMAS GRINDELL,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed.

WEBSTER STREET,
Chief Justice, Supreme Court of Arizona.

Service of the within writ of error and receipt of a copy thereof is hereby admitted this 13th day of November, 1900.

WILLIAM HERRING,
Attorney for defendant in error.

358 *The answer of the judges of the supreme court of the Territory of Arizona.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the date and place within contained in a certain schedule to this writ annexed, as we are within commanded.

By the court:

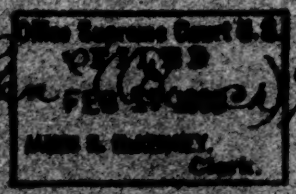
[SEAL.] THOMAS GRINDELL.
Clerk of the Supreme Court of the Territory of Arizona.

359 (Indorsed:) No. 690. Supreme court Arizona. U. S. vs. Copper Queen, etc. Writ of error filed November 17th, 1900. Thos. Grindell, clerk.

(Indorsement on cover:) File No., 18007. Arizona Territory. Supreme Court. Term No., 522. The United States, plaintiff in error, vs. The Copper Queen Consolidated Mining Company. Filed December 27, 1900.

No. 218.

Br. of Atty. Gen. for P. E.



Filed Feb. 17, 1902.

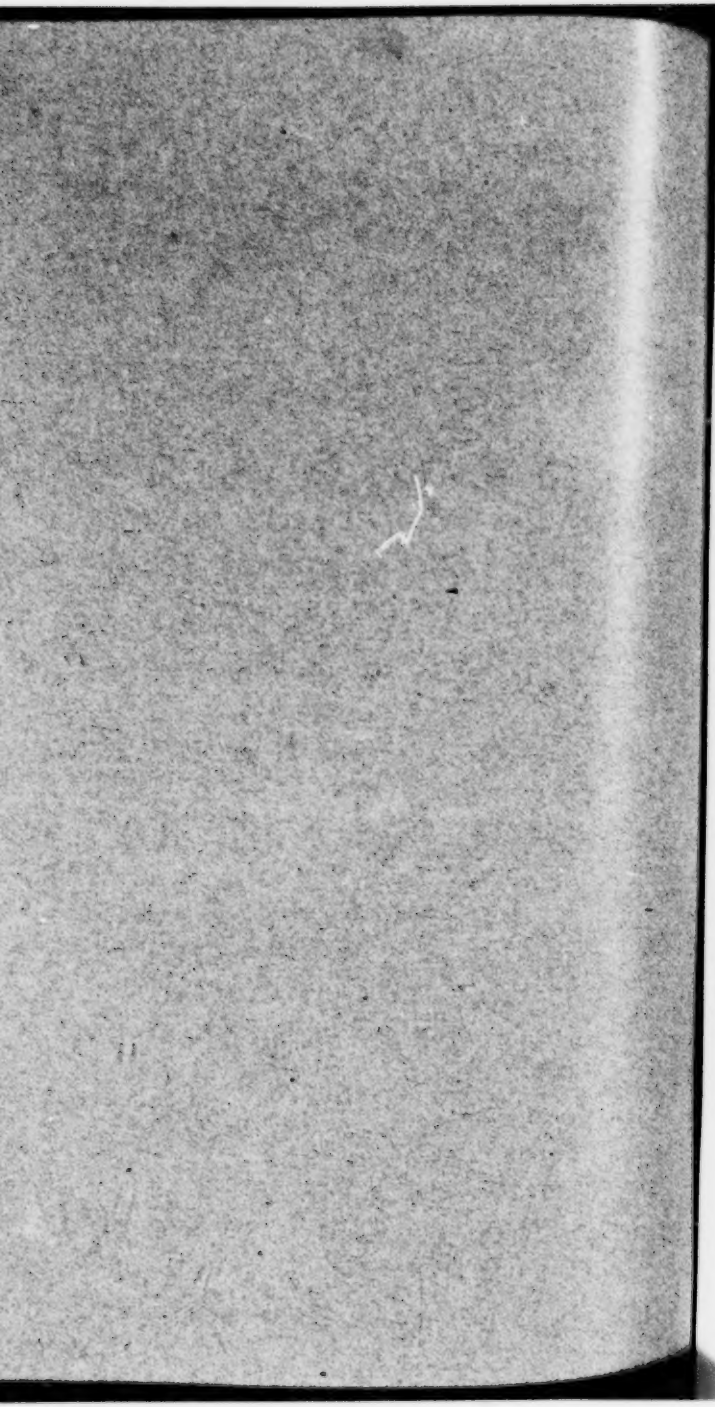
In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE COPPER QUEEN CONSOLIDATED MINING COMPANY. } No. 218.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR THE UNITED STATES.



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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE COPPER QUEEN CONSOLIDATED MINING COMPANY.
No. 218.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR THE UNITED STATES.

HISTORY OF THE CASE.

This case was originally commenced in one of the United States district courts of Arizona, against the present defendant and one Daniel D. Ross, for cutting and removing from plaintiff's land in Arizona 5,905,500 feet of timber, of the value of $183,070.50. Before the final trial Ross died and the case was continued as against defendant company.

The cutting and removing of the timber by Ross was admitted, and also the value, as charged, and it was shown as well as practically settled beyond controversy that Ross sold it at Bisbee, Ariz., to the defendant company, who used it for mining purposes in said Territory.

It appeared that defendant did not cut and remove any portion of the timber.

The defendant was at the time and is now a corporation organized under the laws of the State of New York, but conducting mining operations in Arizona.

The defendant claimed that Ross had license to cut and remove the timber sued for by plaintiff, and that such license arose under the authority of the act of Congress of June 3, 1878 (20 St. L., 88). The section of the act in question reads as follows:

> That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes. * * *

On the trial of the cause in the district court evidence was introduced upon the part of the plaintiff to show that the land from which the timber was cut was

unsurveyed territory in and about Rock Creek Valley of Chiricahua Mountains, in the Territory of Arizona. Evidence was sought to be introduced as to the amount and value of the timber cut, whereupon it was expressly admitted by defendant's attorneys that said Ross cut and removed the timber and that it was purchased by the defendant company from him, substantially as alleged by plaintiff, and that it was of the value hereinbefore stated.

The defendant then introduced testimony tending to show that the lands from which the timber was cut were mineral, and therefore of such a character as to come within the terms of the statute above quoted.

No evidence was introduced having a tendency to show that said Ross was a citizen of the United States; nor was there any evidence tending to show that he was a bona fide resident of the Territory of Arizona; nor was there any evidence tending to show his residence at the time of the cutting and removal of such timber, except that contained in his deposition taken while he was still living and a defendant on a former trial, and read in evidence upon this trial by reason of his decease. This deposition will later on be set forth for the purposes of the argument.

Much evidence was introduced by the plaintiff in rebuttal tending to show that the lands in question were *not mineral lands* within the meaning of the said act of Congress. There was no controversy as to whether the regulations of the Secretary of the Interior relative to the protection of timber and undergrowth had been violated.

Upon the completion of the testimony in the case a motion was made by the attorneys for the United States that under the evidence in the case the jury should be instructed to find a verdict for the plaintiff for the amount claimed and admitted, which motion was denied by the trial court.

Various requests were made upon both sides for instructions to the jury, a portion of which were refused by the court.

The jury found a verdict for the defendants, and thereupon a motion was made to set aside the verdict and for a new trial. This motion was denied by the court. The case was thereupon taken by appeal to the supreme court of the Territory of Arizona. Errors of the trial court were duly assigned. The judgment of the district court was affirmed by the Territorial supreme court. Motion for a rehearing was made and denied by such supreme court. A writ of error was taken to this court, and several causes of error are duly assigned.

ARGUMENT.

Several of the assignments of error are directed to that portion of the case which relates to the character of the lands from which the timber was cut and removed, in respect to their being mineral or non-mineral lands. There is some testimony having a tendency to show that the same were mineral lands, while it would appear that the weight of the testimony and evidence strongly preponderated against such contention. The doctrine is laid down by this court in

cases brought from the Territorial courts that it *will not weigh* the testimony and evidence adduced in the trial court. We therefore do not deem it proper to discuss that subject further.

Error is also assigned because certain rules and regulations of the Secretary of the Interior as to cutting and removal of timber from the public lands were not given by the trial judge as part of his instructions to the jury, as requested by the attorneys for the United States. But a careful consideration of the point thus raised leads counsel here to the conclusion that instructions were given substantially covering the same ground as far as the act of Congress was intended to go, and as the Secretary of the Interior could not enlarge upon the terms of the act in such manner as to contract the scope of the authority for cutting sought to be granted, we think the error, if any, was not sufficiently substantial to warrant further contention.

Therefore the issue here will be narrowed down to the one proposition as to the alleged error of the courts of Arizona, first, in declining to instruct the jury to find for the plaintiff, and, later, in holding that it was unnecessary to show that Ross, the party who cut and removed the timber, was a citizen of the United States, or that there was any evidence sufficient to be submitted to the jury that he was a bona fide resident of the Territory of Arizona.

This issue was carefully raised throughout the progress of the case from the closing of the testimony on the trial to its coming into this court, and it is deemed proper that this court should be asked to pass upon the

action of the lower courts, and to construe the hereinbefore quoted section of the act in question.

As all the testimony in the case is here in the transcript of record, it is easy to find; in fact it seems to be admitted in several places in the record by both the trial court and the supreme court of the Territory of Arizona, that there was an absence of any testimony tending to show in any manner that the said Ross was a citizen of the United States; nor is it anywhere found that he was such, except it may be inferred from the general verdict for defendant.

As to the further question, whether he was a bona fide resident of the Territory of Arizona, it seems to have been conceded by the Territorial supreme court that the only testimony upon that question was contained in the deposition of said Ross, which will be found on pages 96–99 of the record. His exact language is as follows: "I moved into Rock Creek and began to cut timber there in April, 1887." His testimony further shows that he had a sawmill there, and merely indicates the manner of his conducting the operations and the manner in which he delivered the timber to the defendant company. There is no word of evidence other than as stated to indicate where he resided, where his family resided, his voting place, or any other of those circumstances from which a witness's residence may be ordinarily determined.

Therefore we assume that these requirements of the statute, in order to make the privilege of cutting available to a person, were not complied with by the defendant company in the trial of this cause.

It is true that on such trial the court, after refusing the motion of plaintiff for an instruction to the jury in their favor, did instruct the jury upon the general subject of the requirements of the statute, and it particularly called their attention to those requirements as to residence and citizenship. Such instructions may be found in the record, page 249, and are as follows:

> It is also incumbent upon the defendant, in order to avail itself of the permission granted by said act of June 3, 1878, and in order to justify its purchase and consumption of said timber, to show by a preponderance of the evidence that Daniel D. Ross at the time of the cutting and removal of said timber from the lands of the plaintiff was a citizen of the United States and was a bona fide resident of the Territory of Arizona; and should the evidence in this case fail to establish that at the time of the cutting and removal of said timber the said Daniel D. Ross was a citizen of the United States and a bona fide resident of the Territory of Arizona, you must find for the plaintiff, without regard to the mineral or nonmineral character of the land.

But it may be seen at a glance that the refusal of the court to instruct the jury for the plaintiff and the giving of the instructions as above quoted was equivalent to an assumption upon the part of the court that there *was* evidence upon these important questions which it was his duty to submit to them with such instructions. That being the case and such evidence being wanting, it may be fairly argued that the court

contributed directly to the error of the jury arrived at in their verdict.

None of the lower Federal courts have passed directly upon the points at issue except in this case; nor has this court directly considered it, so far as can be ascertained. It is, therefore, an entirely new and open question as to whether the courts below were correct or in error. The intention of the trial judge to be fair is everywhere manifest from the record. Nor can it be said that the supreme court of Arizona disposed of the issues otherwise than according to the dictates of fair reasoning. But we contend here that both were none the less in error in the conclusion arrived at.

THE ACT.

While the criticisms of this act made by Judge Deady, of Oregon, in *United States* v. *Smith* (11 Fed. R., 487), were rather too searching and severe, it is not difficult to see that those "apt and fitting terms" so desirable in legislation were in this case the exception and not the rule. Still, Congress must have had an intention, and if possible we should find it.

WERE ALIENS INTENDED TO BE BENEFICIARIES?

The purpose of Congress was to aid miners and mining companies to the necessary fuel and timber with which to prosecute their operations; but this timber was not to be taken from agricultural lands, as that might retard agricultural development, but from the mining or mineral lands. Mining operations, when not carried on by individuals, are commonly carried on by organized corporations. If an individual has

ever sought the advantages of the homestead preemption or mining laws of the United States to obtain lands therefrom, he must have been a citizen thereof, or, being an alien, he must have declared his intention to become such citizen. In fact, it has ever been the settled policy of Congress that aliens might not have equal rights with citizens in and to the public domain, unless they manifested in a legal way their intentions to become such. In this case, if it had been the purpose of Congress to bestow the very valuable license to cut and remove timber free of charge from the public domain without regard to the nationality of the operators, it was only necessary to make such innovation plain, that Congress should have left out the words "citizens of the United States and other"—and thus the section would have read "all persons bona fide residents," etc.

Who, then, could have been intended by the use of the words "and other persons"? We believe that it was those artificial persons known as companies or corporations—not foreign corporations or companies—but such as were organized and doing business under the laws of the United States, or some of the States, so as to stand in the same legal position as individual citizens thereof.

It will not be necessary to discuss this topic further at this time, as opportunity for future consideration will occur on oral argument.

BONA FIDE RESIDENTS.

The next question is, Who were intended to be considered bona fide residents? We have already seen

(argued) that parties claiming license under this act must have been citizens of the United States. But this was not all. They must have been bona fide residents of one of the States or Territories mentioned in the act, or of some mineral district where there was Government mineral land. In this case (Arizona) Ross, who cut this timber, appeared to have been engaged in the business of cutting timber and lumber. He testifies simply that he "moved in." In that connection mention is made of his sawmill, his tools, and equipments, but nothing is said of his family—if he had one—or anything else which would tend to fix his residence. Neither citizenship nor residence can be inferred or presumed from mere business operations standing alone. This man might have lived in Canada, had his family there, cast his vote there, and even done his banking there, but have cut and manufactured the trees of the United States in Arizona. Or he might have had a perfectly legal residence in Sonora, Mexico, only 10 miles to the south, or in California, a few hours' ride to the westward, or in New Mexico, a very short distance east of where this cutting and removal of the timber took place. Nor were the jury enlightened by any evidence submitted as to what was intended by Ross's statement above quoted. He does not say from what State he moved, nor to what State or Territory he came. He might have intended to imply that he came from territory other than that of Arizona, to that *mining region.*

As before stated, the place was just on the border of Mexico, and not far from New Mexico. The State of

Sonora in Mexico is well known to be almost wholly a *mining* territory or region. It is also well known that southwestern New Mexico abounds in actually developed and prospective mining lands. The regions thereabouts where mining is carried on are so vast that there is nothing whatever which serves to indicate to any degree of certainty what was intended by him to be inferred from the single expression. Moreover, the failure to ask of him the usual preliminary question as to his name, age, residence, and occupation in some measure serve to indicate that the subject of his citizenship and residence were intentionally avoided by defendant's counsel. Was it his mill, then, his tools, or his other belongings, or was it himself that moved in? Which? There are no presumptions arising from his testimony, no side lights upon the subject—especially in so much as to demonstrate him to have been a bona fide resident of Arizona.

It is plain that Congress did not intend to make this concession to an ordinary sojourner, for the term "residence" was preceded by the expression "bona fide." As a matter of strict American law the two expressions were equivalent to *undisputed domicil.*

At the earlier common law a distinction was made between the terms "residence" and "domicil," the former being a broader and more general term; but for a long time past in the legislation of this country "residence" has been the term commonly used to signify "domicil."

Residence, in American legislation, generally,

though not always, means domicil. (Jacobs on Domicil, sec. 75.)

There are a large number of cases upon this topic, embracing a very wide range of subjects, including copyright laws, judicial citizenship, settlement, taxation, voting, insolvency, limitations of action, divorce, jurisdiction, probate jurisdiction, naturalization, attachment, and homestead exemption.

These cases serve to show for almost every imaginable purpose incidental to law and legal proceedings in American legislation that residence and domicil are synonymous terms.

Under the United States copyright acts of February 3, 1831, and August 18, 1856, which provided that persons in order to avail themselves of the privileges of these acts must be citizens of the United States or residents therein, Judge Drummond in *Boucicault* v. *Wood* (2 Biss., 38), said:

> Residence ordinarily means domicile, or the continuance of a man in a place, having his home there. * * * In order to constitute residence it is necessary that a man should go to a place and take up his abode there with the intention of remaining there.

In *Abington* v. *North Bridgwater*, the supreme court of Massachusetts, in considering the question of a pauper's settlement in a township, says:

> It has been argued in behalf of respondents that residence is something different from and something less than domicile. If this be so under some circumstances, and in connection with the particular subjects or particular words which

> may tend to fix its meaning that in general residence and domicile are regarded as nearly equivalent, then there seems to be no reason for making the distinction in the present case. (23 (40) Pick., 170.)

The same court, in deciding a matter of taxation of a person as a resident and inhabitant of Boston, say, in *Thorndike* v. *Boston* (1 Met., 245):

> The questions of residence, inhabitancy, or domicile—for although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence—are attended with more difficulty than most any other.

The same court, by the same judge, Chief Justice Shaw, considering the right of a party to vote, where the statute provided that every male citizen of 21 years of age and upward, who shall have resided in the State one year and upward, etc., say:

> But the question of residence * * * may be, and often is, one of considerable difficulty. The term "resident" and "inhabitant" are equivalent. * * * Both terms indicate the place of one's home or dwelling place, which depends upon the common-law doctrine of domicile. (*Blanchard* v. *Stearns*, 5 Met., 298.)

In two other cases in insolvency, where a party was required by statute to have a residence within the State, the same court and judge reiterated the same doctrine. (*McDaniel* v. *King et al.*, 5 Cush., 473; *Collister* v. *Hailey*, 6 Gray, 518.) And this court again held, in a case resting under the statute of limitations, the same rule. (*Langdon* v. *Dowd*, 6 Allen, 425–426.)

In divorce proceedings the rule was also pursued by them. (*Shaw* v. *Shaw*, 98 Mass., 1–58.)

There are numerous other cases from that State which might be cited, but we have only given several, instead of one, because the Massachusetts rule seems to have been followed generally, and often quoted by the courts of a large number of the other States.

In Rhode Island it was held that residence in the constitution of that State means domicile, and not merely habitancy. (*State* v. *Aldrich*, 14 R. I., 171.) This was a case involving the elective franchise. In New York a large number of cases held to the same doctrine, a large number of subjects being involved. We cite but one of them. In *Kennedy* v. *Ryall* (67 N. Y., 386), the court say: "Generally speaking, residence and domicile mean the same thing."

In New Jersey the law required that a voter "hath resided in the county where he claims a vote," and it was there held that the residence required in the laws of this State to entitle a person to vote at an election means his fixed domicile, or permanent home. Exactly the same doctrine was adopted in Pennsylvania in the soldiers' vote act in 1862. "Residence" in the constitution is the same as domicil, the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights. (*Chore* v. *Miller*, 41 Penn. St., 404.) In North Carolina, "residence as used in the clause in the constitution defining political rights is synonymous with domicil, denoting a permanent dwelling place to which the party when absent intends to return." (*Harmon* v. *Grizzard*, 89 N. C., 115.)

The same doctrine is held in Florida, in *Dennis* v. *State*, where nearly all the authorities in the various States are reviewed and considered, and where a conviction of perjury was set aside for swearing in defendant's vote while he was staying in Washington as an official of the Treasury Department (17 Fla., 389).

Only one of several cases in Alabama need be cited to show that the supreme court of Alabama held to the same doctrine that residence is synonymous with domicile. (*Talmadge's admr.* v. *Talmadge*, 66 Ala., 199.)

In Illinois, residence was held in a contested election case to be the same as domicile. (*Dale* v. *Irwin*, 78 Ills., 181.) The supreme court of Michigan adopted the doctrine of Massachusetts, to the same effect that residence means the same as domicile. The subject considered was the Statute of Limitations. (*Campbell* v. *White*, 22 Mich., 196–197.) Four other States—Wisconsin, Iowa, Missouri, and Minnesota—also so held, in the following cases:

Hall v. *Hall*, 25 Wis., 600;
Hinds v. *Hinds*, 1 Iowa, 36;
Church v. *Crossman*, 49 Iowa, 447;
Chariton County v. *Moberly*, 59 Mo., 238;
Venable v. *Paulding*, 19 Minn., 488.

It seems almost certain, therefore, that the term *bona fide residents* was intended by Congress in enacting this statute to mean persons domiciled in (applying the statute to this case) Arizona.

So construing the statute, it may be perfectly proper to inquire what one of the great number of elements indicative of domicil was before the jury in the case

under consideration. It is not shown where Ross ate, slept, boarded, kept house, voted, traded, attended church, had his business office, maintained his family, if possessed of one, or whether even this was the only timber cutting and manufacturing operations he conducted. There is no evidence from which a presumption of even temporary residence can arise. The whole situation is "without form and void," like the preliminary stages of creation in Genesis.

Upon what basis, then, could the trial court venture an instruction to the jury as to bona fide residence or citizenship of the United States? To do so was not to guide the jury in passing upon the evidence in the case, but to lead them directly into error, as where the blind leads the blind; and the supreme court of the Territory fell into the same error in passing upon these two plain requisites to a successful defense against the Government's admitted prima facie case.

The court should have ordered a verdict for the United States on motion of its attorneys. Had this been done and if then and there the defense had offered to supply the necessary evidence on these two points, the court as a matter of discretion could have admitted such evidence, in which case the court's subsequent action would have been proper. But it was not done, and we, therefore, submit that the case should be reversed.

MARSDEN C. BURCH,
Attorney for the United States.

FEBRUARY 13, 1902.

O

No. 218.

Brf. of Herring & Chaney

Office Supreme Court U.S.
FILED
MAR 1 1902
JAMES H. McKENNEY, Clerk.

Filed Mar. 1, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

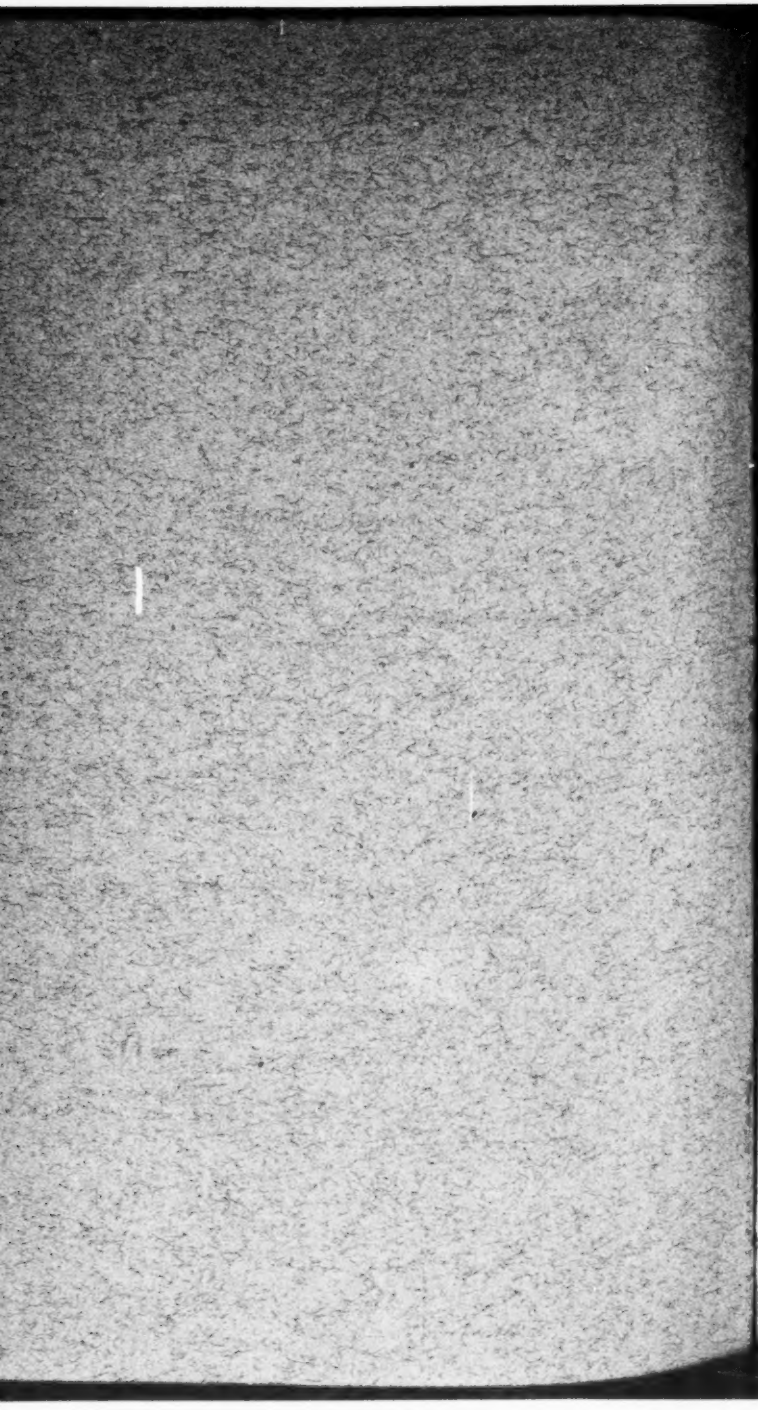
THE UNITED STATES,
Plaintiff in Error.
vs,
COPPER QUEEN CONSOLIDATED MINING COMPANY,
Defendant in Error.
} No. 218.

WRIT OF ERROR FROM SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM HERRING and
JOHN C. CHANEY,
Attorneys for Defendant in Error.

WILLIAMS, LAW PRINTER, 519 E STREET, N. W., WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM. 1901.

THE UNITED STATES,
Plaintiff in Error,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY,
Defendant in Error.

No. 218.

WRIT OF ERROR FROM SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case by Defendant in Error.

The history of the case presented by plaintiff in error, is erroneous in the following particulars, to-wit:

First: The issue presented by plaintiff in its complaint was that the timber in question was wrongfully cut, caused to be cut, removed, taken by, delivered to, used and consumed by defendant, COPPER QUEEN CONSOLIDATED MINING COMPANY; and it was upon

this theory that plaintiff conducted the trial of the case, and this issue was squarely presented for the determination of the jury and was only "practically settled beyond controversy," by its verdict.

The cutting and removal of the timber by the COPPER QUEEN CONSOLIDATED MINING COMPANY was a fact directly in issue to be determined by the jury. It cannot be assumed that the jury was precluded from deciding upon the evidence whether or not defendant, Copper Queen Consolidated Mining Company, itself cut the timber or caused it to be cut. It was one of the questions to be submitted to the jury from the evidence whether the defendant itself (through its agent) was primarily liable for the cutting, as charged in the complaint; or whether Ross himself cut or caused to be cut the timber.

Under the issues joined and the evidence in the case, if the jury found that the defendant, itself was directly responsible for cutting the timber, in accordance with plaintiff's theory of the case, the citizenship or the *bona fide* residence of any third person was entirely immaterial in determining defendant's liability for said cutting.

It cannot, therefore, be claimed, as stated by counsel for plaintiff in error (p. 1, brief for the United States) that, "the cutting and removing of the the timber by Ross was a matter settled beyond controversy," until the verdict of the jury was rendered.

Second: The statement in the "History of the Case" (p. 2, said brief) that:

"It appeared that defendant did not cut and remove any portion of the timber," is the assumption of a fact in issue in the case, which, under the pleadings and evidence in the case, was required to be submitted to the jury.

Third: The statement in the "History of the Case" (p. 3, said brief.)

> "And that it was purchased by the defendant company from him substantially as alleged by plaintiff, is at variance with the record. . The complaint does not sustain this statement (Trans. of Rec., 89)."

Again the following in the "History of the Case" (p. 3, said brief), is directly controverted by defendant in error.

> "No evidence was introduced having a tendency to show that said Ross was a citizen of the United States; nor was there any evidence tending to show that he was a *bona fide* resident of the Territory of Arizona; nor was there any evidence tending to show his residence at the time of the cutting and removal of such timber, except that contained in his deposition taken while he was still living, and a defendent on a former trial, and read in evidence upon this trial by reason of his decease."

On the contrary, while the record does not purport to contain *all the evidence* in the case, it sufficiently appears that Ross had the requsite qualifications to avail himself of the privilege of cutting and removing the timber in question under the Act of June 3rd, 1878. (20th St., L. U. S., 88.)

Evidence in the record, other than the deposition of Ross will be later set forth and referred to in the argument. Otherwise the statement of the case by plaintiff in Error is substantially correct.

Points and Authorities.

I.

The bill of Exceptions does not purport to contain all the evidence. This Court, therefore, cannot review the

action of the Trial Court in denying plaintiff's motion made at the close of the evidence, that the Court instruct the jury to find on the evidence adduced a verdict for the Government.

Texas & Pacific R Co. *vs.* Cox, 145 U. S., 593 to 608.
Russell *vs.* Ely, Second Black, 575.

II.

The Court properly refused to direct a verdict for plaintiff. The case should not have been withdrawn from the jury unless the conclusion followed, as a matter of law, that defendant was not entitled to verdict upon any view which could be properly taken of the facts which the evidence tended to establish.

Texas & Pacific R. Co. *vs.* Cox, 145 U. S., 593.
Gardner *vs.* Railroad Co., 150 Id. 349.
Dunlap *vs.* Northeastern R. Co., 130 Id. 649–652.
Kane *vs.* North Central Railroad Co., 128 Id. 91.
Jones *vs.* East Tenn., etc., R. Co., Id. 443.
Mo. K. & T. Ry. Co. *vs.* Hall, 87 Fed. 170.
Chicago G. W. Ry. Co. *vs.* Healy 86 Id. 244–249.

III.

A *bona fide* resident of the territory of Arizona is expressly authorized to cut timber on the public mineral lands, and it is immaterial whether the evidence discloses that such resident was also a citizen of the United States, or not.

Act of June 3rd, 1878, 20 St. L. U. S. 88.
United States *vs.* Smith, 11 Fed. 487, 8th Sawy. 101.
United States *vs.* Richmond, Min. Co., 40 Fed. 415.
United States *vs.* Eureka & P. R. Co., 40 Fed. 419.

IV.

Reference may be had to the proceedings of Congress to inform the Court as to the exigencies of the mining

interest and the reason for authorizing the cutting of timber on public mineral lands. These proceedings serve to indicate the probable intention of Congress in the passage of the Act.

Jennison *vs.* Kirk, 98 U. S. 453.
The Delaware, 161 U. S. 459.
Am. Net & Twine Co. *vs.* Worthington, 141 U. S. 468–474.

V.

A verdict on conflicting evidence will not be disturbed where there is some evidence to support it.

Parsons *vs.* Bedford, 3rd Peters, 433–447.
N. Y. C. & H. R. R. Co. *vs.* Fraloff, 10 Otto, 24.
Chicago, B. & Q. R. Co. *vs.* Chicago, 166 U. S. 226–246.
Aetna Life Insurance Co. *vs.* Ward, 140 U. S. 76.
Erie R. R. Co. *vs.* Winter, 143 Id. 60.
Carter *vs.* Ruddy, 166 Id. 491.

VI.

Upon writ of error to the Supreme Court of a Territory this Court will not review the action of the Trial Court in denying a motion for a new trial.

Sparrow *vs.* Strong, 4th Wall. 584–588.
Kerr *vs.* Clampitt, 5 Otto. 188–190.

And the final judgment cannot be examined through the rulings of the Trial Court upon that question.

Kerr *vs.* Clampitt, *supra.*

VII.

Error can not be predicated upon the opinion of the Court.

Columbus Safe Deposit Co. *vs.* Burke, 88 Fed. 630.
Evans *vs.* Suess Oram, Glass Co. 83 Fed. 706.
England *vs.* Gebhardt, 112 U. S. 502.

VIII.

Inferences of fact fall within the exclusive province of the jury.

Caffin *vs.* United States, 162 U. S. 664.

ARGUMENT.

The question presented by the writ of error in this case is greatly simplified by Counsel for the Government in discarding the useless propositions embraced in the several assignments of error presented upon which allowance of the writ of error was based. A closer investigation by counsel of the transcript of record in the case would probably have satisfied him that the last remaining prop upon which he relies to base an argument is without foundation. So far as the question presented is concerned, it is sufficient to call the attention of the Court to the material fact that, voluminous as is the bill of exception in the case, it does not purport to contain all the evidence. Russell *vs.* Ely, 2 Black, 575; Texas & Pac. R. Co., *vs.* Cox, 145 U. S., 593–608. The assignment of error relied upon by counsel for plaintiff in error therefore calls but for brief discussion. We concede that a motion to instruct the jury peremptorily, is not addressed to the discretion of the Court, but it presents a question of law which it is the duty of the Court to decide; and the ruling of the Court, in granting or refusing the motion, is as much the subject of exception by the party aggrieved as any other ruling of the Court in course of the trial. It is clearly settled, however, that such a motion should prevail only when there is a total failure on the part of the plaintiff to make out a case, or on the part of the defendant to establish a defense; and that it is not error to deny the motion where there is a conflict of evidence upon

any material issue. In other words, the established rule is that it is not error to deny such a motion, unless, it is clear that the facts established by the evidence, with every reasonable and proper intendment, are insufficient to warrant a verdict against the moving party. That the present case does not fall within the rule sought to be invoked by plaintiff in error is plainly demonstrable.

If the defendant had wholly failed to make out a defense, and, upon the evidence adduced, there was no question to submit to the jury, the proper time to move for a peremptory ruling or instruction for a verdict for the plaintiff was when the defendant rested. And, in view of the course which was adopted, and of the opinion expressed by the trial judge in overruling the motion for a new trial, that there was conflicting testimony, and the similar opinion expressed by the Supreme Court in affirming the judgment, we cannot believe that any reference whatever to the evidence is necessary in discussing the present proposition, under the assignments of error here relied upon by counsel for plaintiff in error.

At the trial, the Court construed the Act of June 3rd, 1878, precisely as counsel for plaintiff contended it should be construed, and in his charge to the jury they were told that their verdict must be for the plaintiff without regard to the mineral or non-mineral character of the land, unless the defendant established, by a preponderance of evidence, that Ross was a citizen of the United States, and a *bona fide* resident of the Territory of Arizona. In ruling on the motion for a new trial the learned Judge expressed doubts as to the correctness of his construction of the Act of June 3rd, 1878, at the trial; and it was in reviewing his ruling, overruling the motion for a new trial, that the construction now complained of was announced in the Supreme Court of the Territory.

But the question is a wholly immaterial one upon this record. We concede that there is no evidence in the Bill of Exceptions as to the *citizenship* of Ross. There is evidence, however, that he was a *bona fide resident* of Cochise County, Arizona, and of Rock Creek in said county; but the Bill of Exceptions does not purport to contain *all* the evidence; and in view of this fact, and of the further fact that when he submitted the question of Ross' citizenship to the jury, the learned Judge believed that it was incumbent upon the defendant to prove such citizenship by a preponderance of evidence, and so instructed the jury, the presumption is conclusive, in this court, that upon the trial of the case there must have been some evidence on the point. Had there been *no* evidence *whatever* on the point—not even "one word,"—as the seventh assignment of error alleges, the jury would, certainly, in the view which the Court then took of the law, have been instructed to return a verdict for the plaintiff. The verdict of the jury is conclusive, in this Court, therefore, that Ross was a citizen of the United States; and it appears to be useless to consider what the law of the case would have been had he not been a citizen. As the bill of exceptions does not purport to contain all of the evidence, the plaintiff in error cannot be heard to allege that there was no evidence on an issue expressly submitted by the trial judge to the consideration of the jury.

Russell *vs.* Ely, 2nd Black 575.
Texas & Pac. R. Co. *vs.* Cox, 145 U. S. 593–608.

Inasmuch, however, as it is contended, in the brief of the plaintiff in error, that Ross must be shown to be a citizen, and a *bona fide* resident, in order to justify the cutting alleged in the complaint, and as plaintiff in error contends that there was no evidence to prove either his

residence or citizenship, we direct the attention of the Court to the following:–

The complaint alleges that "defendant cut and caused to be cut the timber therein referred to." In the answer (par. II, p. 10 Tr. of Rec.) defendant expressly denies that "it cut or removed, or that it caused to be cut or removed, the said timber, or any part thereof."

One of the issues involved in the case is:–

Did the defendant cut and cause to be cut the timber referred to? There was some evidence to support the allegation of the complaint referred to, from which it might have been inferred that defendant itself (through its agent) was primarily responsible for the cutting, as charged in the complaint (Tr. of Rec., pp. 8, 19, 20, 21 and 22). As there was some evidence to support plaintiff's theory of the case, that defendant itself was directly responsible for the cutting of the timber, appellant cannot be heard to contend that it was entitled to a verdict, because, as it alleges, there was no evidence to support defendant's theory of the case.

No question is raised in the case as to the defendant's being qualified to cut under the provisions of the Act of June 3rd, 1878. The admission of plaintiff in the pleadings, and at the trial, and the evidence in the case conclusively show, that the defendant was qualified to avail itself of the privilege conferred by that statute (Tr. of Rec., p. 8, 25).

Section one, R. S. U. S. provides that the word person may extend and be applied to Corporations.

Plaintiff's contention that one must be both a citizen and a *bona fide* resident is utterly without foundation; but even if this be the law, the defendant Corporation, as shown by the pleadings and evidence referred to, possess-

ed both qualifications. (Sec. 23 and 25 R. S. U. S.) Decision relating to Public Lands, Dept. of Interior, Volume 22, p. 83, rule 76. Circular of Dec. 10, 1891. Decision relating to Public Lands, Vol. 22, pp. 1, 2 & 3.

Under the pleadings and evidence in the case there was an issue as to whether Ross or the defendant cut and caused to be cut and removed the timber referred to in the complaint. There is direct and positive evidence showing that Ross was a *bona fide* resident of Arizona at the time the timber was cut. It is alleged within the complaint and expressly admitted in the answer that Rock Creek is in Cochise County in the Territory of Arizona. Daniel D. Ross, (now deceased, but whose testimony given at the former trial of this action was given in evidence) testified that he "*moved* into Rock Creek and commenced cutting timber therein in April, 1887;" that he quit cutting there in August, 1893 (Tr. of Rec., pp. 96, 97, 98, 99).

To "move into" a place is to change ones residence to that place. Move, act of changing residence; Webster Dict., Century Dict. Ross changed his residence to Rock Creek, in April, 1887. No evidence was offered at the trial to show that said residence was subsequently discontinued or interrupted, it must therefore, be presumed that his residence continued to be in Rock Creek where it is proved to have been in 1887. Mitchell *vs.* United States, 21 Wall., 350. Jones on Ev., Secs. 52 and 54. 19 American and English Encyc. of Law, p. 76, note one. 21 Id. 125 note; Whitford *vs.* Clark Co., 119 U. S., 522. The testimony of Ross shows that he resided in Rock Creek, and was engaged in cutting timber there from 1887 to 1893. His testimony shows that he cut down a good many trees himself. That he moved hay into Rock Creek for his animals; that he dug a well. The evidence also

discloses the fact of his establishing one mill setting in Rock Creek, and he established a second mill setting in Rock Creek. (Tr. of Rec., pp. 98–99.)

The testimony of Ross shows that he proceeded in good faith to comply with the requirements of the law relative to the cutting of timber upon public mineral lands. This is the only evidence needed to show good faith in cases of this character. No presumption of fraud arises when one seeks to avail himself of a privilege conferred by law. The *weight* and *credibility* of Ross' evidence was a question for the jury. As we have already said, however, in view of the condition of the record, it is entirely immaterial whether the evidence in the record discloses that Ross was also a citizen of the United States, or not. But it may be proper here to further discuss the proposition presented by plaintiff in error in relation to the citizenship of Ross. The act of June 3rd, 1878, in express terms provides that :

"All citizens of the United States and other persons, *bona fide* residents of the States, Territories and Districts therein mentioned, are authorized to fell and remove any timber or other trees on public mineral lands, in either of said States, Territories or Districts of which such citizens or persons may be at the time *bona fide* residents." The language of the act itself is a sufficient reply to the contention of the plaintiff in error that Ross must be shown to be *both* a citizen and a *bona fide* resident.

In a case decided soon after the Act of June 3rd, 1878, was passed, Judge Deady, in construing this statute, uses the following language :

"This Act contains three sections. The first one authorizes any *bona fide* resident of the States or Territories aforesaid," naming them "and all other mineral districts of

the United States" to fell and remove, for building, agriculture, mining or other purposes, "any trees growing upon the public lands, said lands being mineral, and not then subject to entry except for mineral entry," etc. United States *vs.* Smith, 11 Fed., 487. See also United States *vs.* Eureka & P. R. Co., 40 Fed., 419. United States *vs.* Richmond Mining Company. 40 Fed., 415.

In Northern Pacific Railroad Company *vs.* Lewis, 162 U. S., 363, it appears, from the statement of the case, that the plaintiffs were citizens of the United States and and residents of Montana. The language, in the opinion of the Court, cannot possibly be construed to mean that a person who was a resident, and not a citizen, could not cut timber on mineral lands. No such point was involved in the case; and in the case of the United States *vs.* Lynde, 47 Fed., 297, it appears that Lynde was both a citizen of the United States and a *bona fide* resident of Montana. In no case is it held that any one who cuts timber on the mineral lands must be both a citizen of the United States and a resident of one of the States or Territories named in the Act of June 3rd, 1878, or that *bona fide* residence is not a sufficient qualification for one to avail himself of the privileges conferred by that Act.

Further referring to the statement of counsel for plaintiff in error that "no evidence was introduced having a tendency to show that Ross was a citizen of the United States; nor was there any evidence tending to show that he was a *bona fide* resident of the Territory of Arizona." We direct the attention of the Court to the testimony of Ben Williams, a witness called by the Government who says:

"I knew a man by the name of Daniel D. Ross, I first became acquainted with him about '83, or '84, (p. 20, Trans. of Rec.). Upon being asked the question "Well

about the year 1890, then did you have any business transaction with Ross with reference to the purchase of timber?" The witness answers, "I think twice or three times I had purchased timber for the Company of Mr. Ross (Tr. of Rec., pp. 20 and 21)". "The first purchase of timber or lumber from Ross was in the Fall of 1885. I knew at the time that the contract was made, and during the delivery of the timber the timber was coming from the Chiricahua Mountains, from Rock Creek and vicinity. The commencement of the delivery was in 1885, and the last delivery in 1893" (Tr. of Rec., p. 22).

Here there is the evidence of a witness who knew Ross while he was cutting timber in the Chiricahua Mountains and in Rock Creek, from 1883 or 4 to 1893, a period of about 10 years. Rock Creek and the Chiricahua Mountains are situated in Cochise County, Territory of Arizona (Tr. of Rec., pp. 8 and 95).

The testimony of Charles W. Smith, another witness for the Government is as follows:–

"Went to live in Rock Creek in the Winter of 1888 or 1889. Staid there four years, or a little over, in that vicinity. When I first went there, worked for Mr. Ross. Afterwards I worked for myself, driving my own team. When I was driving my own team I was hauling lumber for Mr. Ross. I hauled out of Rock Creek (Tr. of Rec., p. 215)".

The Congressional Records shed considerable light upon the intent and purpose of the Act of June Third, 1878.

This Act, known as "Senate Bill No. 20", was introduced in the Senate at the Second Session of the 45th Congress.

The bill passed the Senate and went to the House of Representatives, where it was referred to the Committee on Public Lands in the House of Representatives. On May 9, 1878, a favorable report was made by that committee to the House. That report proceeds as follows:–

45TH CONGRESS,
2ND SESSION.

Senate Bill 20.

REPT. 122.

"The Committee have carefully considered the subject of timber and timber lands, and after mature deliberation, with a view of devising the best methods of preserving, cultivating and disposing of the same, have come to the conclusion that a distinction should be made between such trees as grow upon the mountain in the mineral districts, and the forests of pine, oak and other timber that grow in the more level portions of the country.

While the lumber of the latter is a regular and important article of commerce and is constantly being cut and transported in large quantities to ready markets, the character of the former renders the timber unfit for commercial purposes. Even were this otherwise, it is usually found in such inaccessible places as to preclude its transportation to market. Consequently it is used by the prospector, the miner or other members of mining communities for domestic and other practical purposes incidental to the development of mineral districts.

The committee do not believe that it would be wise policy on the part of the Government to seek to profit directly by the sale of this kind of timber nor to tax the pioneer by compelling him to purchase it.

Except as a source of revenue, by sale to the settler, it never can be of any value to the Government.

Should the experiment be tried of requiring pay for it, it would be found that the cost of keeping agents for its sale, and officers to prevent or punish infractions of the law at remote and widely separated settlements, would largely consume all sums received for this timber by the Government.

Thus while it is practically of but little value to the Government it is essential to the settler, and indispensible to his occupation and development of the mineral lands.

It has been the custom of Congress to encourage the exploration and development of the mineral regions of the United States; and in this connection, it should be born in mind that it is mainly to the indomitable energy, hardihood and daring of the pioneer that we are indebted for the discovery and development of gold and silver districts of the country. What would this country be today had it not been for our product of gold and silver during the last quarter of a century? The $100,000,000 annually added by the United States to the world's stock of bullion will amply pay for the use of the scattering timber found in those localities. Instead of imposing this timber as a tax upon this important branch of industry, the Committee are of the opinion that under the restrictions provided in this bill, and on the grounds of equity and public policy, the Government should allow its free use by the actual settler for the purposes alluded to herein."

In 1866, Congress, by express statute authorized the occupation and use of these mineral lands as follows:

"Be it enacted, etc.:

That the mineral lands of the public domain both surveyed and unsurveyed, are hereby declared

to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulation as may be prescribed by law, and subject also to the local customs, and rules of miners in the several mining districts, so far as the same may not conflict with the laws of the United States."

This is an express grant by the Government to the people who occupy this portion of the public domain. There may be no law by which settlers could purchase either the timber necessary for occupation, or the land upon which that timber is found.

It is a well settled principle applied to grants that the grant carries with it all the incidents necessary to enable the grantee to render the grant available.

It is absolutely necessary for settlers to have timber for domestic use in order to enable them to occupy these mineral lands. It would be a mockery to make this grant without including such use of timber.

It cannot be said that it was ever intended the occupants should pay for this timber, since no provision has ever been made for its sale or purchase.

The Government is more than paid for its value by the increased wealth added by mining operations to the grand total of taxable property.

In view of these considerations the committee recommend the passage of the substitute, which contains limitations and guards for the protection of undergrowth and such other restrictions as seem just and equitable."

7 Cong. Rec., 45., 2d Sess., pt. 4, p. 3327, *et seq.*

United States *vs.* Eureka & P. R. Co., 40 Fed. 419.

Reference may be had to the proceedings of Congress to inform the Court as to the exigencies of the mining interests and the reasons for authorizing the cutting of

timber on public mineral lands. These proceedings serve to indicate the probable intention of Congress in the passage of the Act.

Jennison *vs.* Kirk, 98 U. S. 453.

For recent cases in which the Supreme Court of the United States has referred to the report of a Congressional Committee, for a similar purpose, see:–

The Delaware, 161 U. S. 459.
Am. Net and Twine Co. *vs.* Worthington, 141 Id. 486, 474.

Extracts from the Journals of the Senate or of the House of Representatives, certified by the Secretary of the Senate, or by the Clerk of the House of Representatives, are admitted as evidence in the Courts of the United States, and have the same force and effect as the originals would have if produced and authenticated in court.

Sec. 895, R. S. U. S.
Jones on Ev., Sec. 519.

This report confirms the construction placed upon this Act by these cases:–

United States *vs.* Richmond Min. Co., 40 Fed., 415,
United States *vs.* Edwards, 38 Id., 812.

The cases cited by government counsel on citizenship and residence are inapplicable to the case at bar because:

1. The evidence in the record proves both the citizenship and residence of the Copper Queen Consolidated Mining Company, which is charged with the cutting of the timber.

2. In the absence of proof that the record contains all the evidence, it must be presumed that it was proven to the satisfaction of the jury, that Daniel D. Ross was a

bona fide resident of Rock Creek, Cochise County, Arizona, at the time this timber was cut.

It is proper to show to this court that the motion stated by plantiff in error, in the assignment of errors, in the record, to wit: "That the court instruct the jury to find on the evidence adduced a verdict for the government," (Tr. of Rec., p. 322) is not the motion which was made by the plaintiff in the action at the close of the trial. That motion, as shown by the minute entry in the record, was as follows: "Counsel for plaintiff moved the court to instruct the jury to find for the plaintiff, that defendant has failed to establish any authority or license to cut timber under the act of Congress in that behalf." (Tr. of Rec., p. 283). It appears that the defendant before the court, charged with the cutting of the timber, was the Copper Queen Consolidated Mining Company. (Tr. of Rec., p. 8). In its third amended complaint, plaintiff had alleged that "defendant, the Copper Queen Consolidated Mining Company, is a corporation organized and existing under and by virtue of the laws of the state of New York, and doing business in the county of Cochise, Territory of Arizona." (Tr. of Rec., p. 8).

Proof of the filing of a certified copy of the articles of the Copper Queen Consolidated Mining Company and of the due appointment of a corporate agent, are found in the record. (Tr. of Rec. pp. 25, 307 to 309 inclusive). This was done to show that the Copper Queen Consolidated Mining Company possessed the qualifications of citizenship, and *bona fide* residence beyond any question. It thus appears that so far as the defendant's liability was to be considered by the jury, its citizenship and *bona fide* residence had been established beyond question. To quote the language of the court in overruling plaintiff's motion for a new trial, "there was ample evidence

to satisfy the jury in concluding that the Copper Queen Company was a person entitled to cut and remove the timber, and that it was used for the purposes mentioned in the act." (Tr. of Rec., p. 263).

The language incorporated in the assignment of error in question, is found in the (Tr. of Rec., p. 246), and it there appears that the court immediately decided the motion, but a reference to the minute order (p. 282, 283 Tr. of Rec.), shows that when the evidence in the case closed, the court took a recess until 2 p. m., and that then at the request of counsel for plaintiff that they desired to submit a motion in the absence of the jury, the jury was excused until the following morning, whereupon counsel for plaintiff made the motion as set forth in the minute entry. (p. 283, Tr. of Rec.).

It is suggested that the criticism of Counsel for plaintiff in error, in view of this imperfect record, that "the Court contributed directly to the error of the jury arrived at in their verdict," is not entitled to serious consideration.

Neither is it worth while to discuss the alleged failure of Ross in his deposition to state explicitly in relation to his residence when it is considered that the complaint of plaintiff at the very trial, at which the evidence was taken which is incorporated in said deposition specifically alleged the residence of Ross to be in Cochise County, Arizona. That this was the requirement of the statutes of Arizona at the time of said trial it is presumed this Court will take cognizance. (R. S., Arizona Pleadings.)

Counsel for plaintiff in error concedes that the issue here is narrowed down to one proposition as to the alleged error of the Courts of Arizona.

1st. "In declining to instruct the jury to find for the plaintiff, and later in holding that it was unnecessary to show that Ross, the party who cut and removed the

timber, was a citizen of the United States," or "that, there was no evidence sufficient to be submitted to the jury that he was a *bona fide* resident of the Territory of Arizona. Counsel for plaintiff in error states that "this issue was carefully raised throughout the progress of the case and this Court is asked to pass upon the action of the lower Courts and to construe the hereinbefore quoted section of the Act in question" and then counsel for plaintiff in error proceeds to say (page 6 plaintiffs brief in error.) "As all the testimony of the case is here in the transcript of record it is easy to find", and then the counsel proceeds to state (p. 6 brief for U. S.) that he does not find anywhere in the record that Ross was such citizen, except it may be inferred from the general verdict for defendant, and again (p. 7 of said brief) counsel quotes the instructions given by the trial Court (found in Tr. of Rec. p. 249) and proceeds "but it may be seen at a glance that the refusal of the Court to instruct the jury for the plaintiff and the giving of the instructions as above quoted was equivalent to an assumption upon the part of the Court that there was evidence upon this important question which it was his duty to submit to them with such instructions." (p. 7 brief for the U. S.)

Let us say *again* that :

The transcript of record does not purport to contain all the evidence in the case The conclusion reached by counsel for plaintiff in error after considering the language of the Court contained in the instructions which he quotes was undoubtedly the conclusion which the Trial Court had reached when the motion to direct a verdict was presented, namely, that there was evidence upon this important question which it was his duty to submit to the jury with the instruction quoted. In the absence of

any proof that the record contains all the evidence in the case, this Court, in passing upon the assignment of error in question is bound to presume that there was sufficient evidence before the Court upon the question of citizenship and *bona fide* residence of Ross to justify the Court in submitting that issue to the jury; and we respectfully insist that the evidence *does prove* the *bona fide* residence in Arizona of both Ross and the defendant at the time the timber in question was cut.

We submit that the judgment of the Court below should be affirmed.

WILLIAM HERRING and
JOHN C. CHANEY,
Attorneys for Defendant in Error.

February 20, 1902.

Supreme Court of the United States.

No. 218.—October Term, 1901.

The United States, Plaintiff in Error, vs. The Copper Queen Consolidated Mining Company.	In error to the Supreme Court of the Territory of Arizona.

[May 19, 1902.]

Mr. Justice Peckham delivered the opinion of the Court.

The government has brought this case here by writ of error for the purpose of reviewing a judgment of the Supreme Court of Arizona, affirming a judgment entered upon the verdict of a jury in favor of the defendant. The action was to recover $183,000, being the alleged value of about 5,900,000 feet of timber, said to have been wrongfully cut and taken by the defendant from the surveyed and unsurveyed public lands of the United States in a cañon in the Chiricahua Mountains, sixty miles from the town of Wilcox on the Southern Pacific Railroad Company, in the Territory of Arizona.

The answer joined issue upon the allegations of the complaint, and also set up that the timber was cut by one Ross from public mineral lands of the plaintiff, and was so cut and removed from those lands under the authority of the act of Congress of June 3, 1878, (20 Stat. 88,) the material portion of which reads as follows:

"That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agriculture, mining or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

The answer further set up that Ross had good right and lawful authority to cut and remove the timber, and that it was cut and removed from such lands in good faith, and at the time that he so cut and removed the

timber Ross was a citizen of the United States of America and a *bona fide* resident of the Territory of Arizona.

A trial was had in the District Court before a judge and jury, and upon the close of the evidence counsel for the government made a motion that the court instruct the jury to find on the evidence a verdict for the government, which was refused and an exception taken.

Among other things the court charged the jury as follows:

"It is also incumbent upon the defendant, in order to avail itself of the permission granted by said act of June 3d, 1878, and in order to justify its purchase and consumption of said timber, to show by a preponderance of the evidence that Daniel D. Ross, at the time of the cutting and removal of said timber from the lands of the plaintiff, was a citizen of the United States and was a *bona fide* resident of the Territory of Arizona. And should the evidence in this case fail to establish that, at the time of the cutting and removal of said timber, the said Daniel D. Ross was a citizen of the United States, and a *bona fide* resident of the Territory of Arizona, you must find for the plaintiff, without regard to the mineral or non-mineral character of the land."

The jury found a verdict for the defendant, after which a motion for a new trial was made and denied by the trial judge. An appeal from the judgment entered upon the verdict was then taken to the Supreme Court of the Territory, where it was affirmed.

It thus appears that the judge held, and so charged the jury, that Ross, who did the cutting, must have been not only a *bona fide* resident of the Territory, but also a citizen of the United States, and if he were not, then the plaintiff was entitled to a verdict. The government now says there was no evidence in the case that Ross was a citizen of the United States, nor any tending to show he was a *bona fide* resident of Arizona at the time the cutting was done, and that unless Ross were such citizen and also a *bona fide* resident of the Territory, his cutting of the timber was wrongful and the government was entitled to a verdict. The verdict must be regarded as a finding that Ross was a citizen of the United States and a *bona fide* resident of the Territory when the cutting was done. If he were, there is no question made about his right to cut. The motion on the part of the government at the close of the evidence to direct a verdict for the government upon all the evidence, and the exception to the refusal of the court so to do, would raise the question whether there was any evidence of the citizenship of Ross and of his residence in the Territory when the cutting was done, upon which to base a verdict, were it not that the bill of exceptions lacks an essential statement for that purpose.

It does not appear from the bill that it contains all the evidence given upon the trial. It may be that it does, but we cannot, in the absence of any statement in the bill to that effect, presume it does for the purpose of reversing the judgment herein, upon the assumption that the proper con-

struction of the act of Congress requires such citizenship as well as residence. When this court is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon the trial so that the record shall affirmatively show the fact. (*Russell* v. *Ely*, 2 Black, 575, 580.) In the cited case the court, after remarking that the bill of exceptions did not purport to give all that a certain witness had testified to, said that according to a well-known rule the court under such a condition of the record was bound to presume that there was that in the witness's testimony which justified the instruction. It was then added by the court: "What purports to be the entire deposition of Baker is sent up by the clerk of the District Court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties." The court thus refused to look at the deposition which purported to be the entire deposition of the witness because it was not made a part of the bill of exceptions.

In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did.

So, in *Texas & Pacific Railroad Company* v. *Cox*, (145 U. S. 593, 606,) which was an action to recover damages against the company for the death of plaintiff's husband, resulting from the negligence of the company, it was remarked, in regard to the evidence in the case, that "The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

It is true there is printed herein, together with the bill of exceptions, the statement that a motion for a new trial was made, and the remarks of the court are set forth upon his denial of the motion. The court said that if the verdict were to be set aside, it would have to be based solely upon the failure of evidence to show that Ross was a citizen of the United States, but the court also remarked that at the time when he gave the instruction to the jury, that Ross must have been not only a *bona fide* resident of the Territory but a citizen of the United States, when the cutting of the timber was done, he believed it to be a true expression of the law applicable to the case under the pleadings. It is plain that in the view of the judge

when the case was submitted to the jury, he thought there was evidence upon which a jury might find the fact of the citizenship of Ross. His subsequent statement made upon the refusal to grant a new trial, which inferentially, perhaps, admits that there was not sufficient evidence to show that Ross was such citizen, leaves a foundation for the belief that there was room upon the evidence for a difference of opinion in regard to that fact. However that may be, the record is in such a state that we cannot say that all the evidence given upon the trial is contained in the bill of exceptions, and, therefore, we cannot say that there was no evidence of the residence, and of the citizenship of Ross, upon which the verdict of the jury might be sustained. If there were evidence that Ross was a citizen and a *bona fide* resident, it is admitted that the verdict could not be disturbed by this court. There may have been evidence upon both propositions sufficient to sustain the verdict.

The judgment must, therefore, be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.